Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

JAMES SERVAIS, *et al.*,

Petitioners,

v.

KRAFT FOODS, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

PETITION FOR A WRIT OF CERTIORARI

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110 pp

QUESTIONS PRESENTED

1. A. Whether the Agricultural Adjustment Act, 7 U.S.C. §§ 601, *et seq.* (the "AAA"), and marketing orders thereunder, preempt state regulation of alleged anticompetitive conduct via state antitrust laws given this Court's conflicting decision in *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963), and the conflicting decisions of every lower federal and state court addressing field preemption under the AAA, including two cases summarily affirmed by this Court.

B. Whether the decision of the Wisconsin Supreme Court is expressly contrary to and "inconsistent with long established policy of the Secretary," *Morton* v. *Ruiz*, 415 U.S. 199, 201-02 (1974), and the Department of Agriculture.

2. Whether application of the federal filed rate doctrine to bar a state antitrust cause of action violates federal law where no field preemption is present, given this Court's decisions in *Nantahala Power and Light* v. *Thornburg*, 476 U.S. 953 (1986), and *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981), which hold that application of the federal filed rate doctrine is dependent on a statute's preemptive effect.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners:

James Servais
Douglas Pierce
William R. Dobson
Roger Noll
Rita Noll
Byron Krueger
Melvin Schmitz
Roger Swanson

Respondents:

Kraft Foods, Inc.
Borden, Inc.
Alpine Lace Brands, Inc.
National Cheese Exchange, Inc.

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Petitioners James Servais, *et al.*, respectfully pray that the Supreme Court grant a writ of certiorari to review the judgment of the Wisconsin Supreme Court in this case.

OPINIONS BELOW

The opinion of the equally divided Wisconsin Supreme Court, with the three-justice dissent led by Chief Justice Shirley S. Abrahamson, is reported as *Servais* v. *Kraft Foods, Inc.*, 2002 Wis. 42, 643 N.W.2d 92 (2002). *See* App. 1a-2a.[1] The affirmed opinion of the Wisconsin Court of Appeals is reported as *Servais* v. *Kraft Foods, Inc.*, 2001 Wis. App. 165, 631 N.W.2d 629 (2001) *See* App. 3a-14a (the "Wisconsin Decision"). The initial opinion of the Wisconsin Circuit Court was a transcribed oral decision, dated October 12, 1999, regarding the consolidated cases *Servais* v. *Kraft Foods, Inc.*, 97-CV-1212, *Noll* v. *Kraft Foods, Inc.*, 97-CV-1885, and *Dodson* v. *Kraft Foods, Inc.*, 97-CV-1777. *See* App. 15a-28a.

STATEMENT OF JURISDICTION

The opinion of the Wisconsin Supreme Court was filed on April 30, 2002. By order signed on July 16, 2002, Petitioners were granted an extension of time until September 27, 2002, in which to file a petition for a writ of certiorari.

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1. Citations in the form "App. at __" are to the Appendix to this Petition. Citations in the form "Lodging at __" are to the Lodging accompanying the Petition. All documents included in the Lodging were part of the Record below. Under Wisconsin law, an "equally divided [Wisconsin Supreme] court results in affirmance of the court below." *Village of Brown Deer* v. *City of Milwaukee*, 16 Wis. 2d 206, 217, 114 N.W.2d 493, 499 (1962). Moreover, an opinion of the Wisconsin Court of Appeals that has been so affirmed has precedential authority. *See Kywanda* v. *Kywanda*, 200 Wis. 2d 26, 34, 546 N.W.2d 440, 445 (1996) (relying on Wisconsin Court of Appeals opinion "aff'd per curiam by an equally divided court"); *Stephenson* v. *Universal Metrics, Inc.*, 247 Wis. 2d 349, 363, 633 N.W.2d 707, 713 (Wis. Ct. App. 2001) (same).

This Court has jurisdiction to consider this Petition pursuant to 28 U.S.C. § 1257(a).[2]

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions and statutes involved are the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, § 2, and Section 8c of the AAA, 7 U.S.C. § 608c.

The Supremacy Clause states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every Sate shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The pertinent text of section 8c of the AAA is set forth at pages 29a to 61a of the Appendix.

STATEMENT OF THE CASE

Decisions of this Court and numerous lower courts have long established that state regulation of milk marketing by the states is consistent with the AAA and the Federal Milk Marketing Orders promulgated thereunder ("FMMOs"). By contrast, the Wisconsin Decision holds that state regulation of milk marketing is field preempted by the AAA and the FMMOs.

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2. Affirmance by an equally divided court in the opinion as to which petitioners seek a writ of certiorari is no bar to granting the writ. *See Conroy* v. *Aniskoff*, 507 U.S. 511, 514 (1993) (where "Supreme Judicial Court of Maine affirmed by an equally divided court," certiorari granted); *Hill* v. *Lockhart*, 474 U.S. 52, 53 (1985) (where "en banc Court of Appeals for the Eighth Circuit affirmed by an equally divided court," certiorari granted).

With this faulty premise, the Wisconsin Decision goes on to apply the federal filed rate doctrine to bar claims brought by a putative class of dairy farmers ("Petitioners") under state antitrust law on the ground that calculating damages resulting from artificially depressed milk prices would implicate minimum prices set by FMMOs.[3] As Petitioners argued to the Wisconsin Supreme Court, assuming FMMO prices are implicated in Petitioners' calculation of damages, that would not be a basis for applying the federal filed rate doctrine, because (1) FMMOs do not preempt state regulation of milk prices, and (2) where state regulation is not preempted by federal law, the federal filed rate doctrine cannot apply, because application of the federal filed rate doctrine is a subset of preemption analysis.

If the Wisconsin Decision is not overruled, it will throw into doubt precedents of this Court reaching back almost forty years, as well as the legitimacy of state authorized regulatory regimes governing milk marketing in states such as California and New York. The Wisconsin Decision also prevents Wisconsin itself from regulating a key Wisconsin industry, based on a mistaken believe that such a result is compelled by federal law. When a state court, attempting to be solicitous of federal interests, constrains itself and other states more than is necessary,

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3. Petitioners made it clear below, and it is not disputed, that FMMO minimum prices are significant, if at all, only because Petitioners wish to use them as part of a damages calculation, and that, otherwise, the existence of FMMO minimum prices is irrelevant to Petitioners' case on liability, which is a market manipulation and collusion case.

the Court should be willing to step in and correct such a misunderstanding.[4]

Moreover, if the Wisconsin Decision is not reversed, dairy farmers from all parts of the nation will be deprived of any opportunity to recover for injuries caused by up to ten years of price manipulation by major cheese processors, who manipulated the price of bulk cheese in violation of state antitrust laws.

A. Price Manipulation by Cheese Processors

A 1996 report for the Wisconsin Department of Agriculture, Trade and Consumer Protection ("DATCP"), concluded that Kraft Foods, Inc. and other major cheese processors (the "Cheese Processors") artificially depressed prices for bulk cheese by manipulating the trading on the National Cheese Exchange (the "NCE"). The NCE, a Wisconsin corporation with headquarters in Green Bay, Wisconsin, provided an auction market for bulk cheese, until May 1, 1997. *See* Lodging at L74, L121, L127, L248; Willard F. Mueller, Bruce W. Marion, Maqbool H. Sial, and F.E. Geithman, *Cheese Pricing: A Study of the National Cheese Exchange* (1996).

According to DATCP, the Cheese Processors' ability to manipulate the national market for bulk cheese resulted from

4. Wisconsin has an "$18 billion dairy industry," and 18,000 dairy farms. David Barboza, *America's Cheese State Fights to Stay That Way*, N.Y. Times, June 28, 2001, at C1. Among the states, Wisconsin is "by far the leading cheese producer, accounting for about 30 percent of all U.S. natural cheese manufactured in 1994." Lodging at L52. Wisconsin is also the second largest producer of milk, after California, with Wisconsin accounting for approximately 14.3 percent of all the milk produced in the United States. *See* USDA, *Milk Production, Disposition and Income Summary* (May 1999) at chart titled "Milk Cows and Production of Milk and Milkfat: by State and United States, 1998," *available at* http://usda.mannlib.cornell.edu/reports/nassr/dairy/pmp-bbm/milk1999.

the paradoxical circumstance that, although the NCE was a small, thinly-traded market, trading on the NCE determined the prices at which virtually all bulk cheese was purchased throughout the nation because, by industry custom, the prices for off-exchange purchases of bulk cheese were determined by reference to the price on the NCE. *See* Lodging at L57, L68, L78, L237. Thus, by *selling* relatively small amounts of bulk cheese on the NCE at artificially low prices, the Cheese Processors were able to reduce the price that they would have to pay for the much larger *purchases* of bulk cheese that they made elsewhere, thus reducing dramatically their input costs and increasing their profits.[5]

B. The Dairy Farmers' Injury

Petitioners allege that the Cheese Processors' manipulation of bulk cheese prices injured dairy farmers by depressing the price of cheese. The artificial lowering of cheese prices resulted automatically in the artificial lowering of the price paid to dairy farmers by cheese manufacturers for their milk because 80-85% of the cost of manufacturing bulk cheese is attributable to the cost of the milk. *See* Lodging at L57. By way of context, in Wisconsin, roughly 85% of the state's milk by volume is used for the manufacture of cheese. *See* Lodging at L52, L237.

The prices of the milk sold by the dairy farmers to make cheese was artificially depressed despite the existence of FMMOs, which set a floor under the price of certain sales of milk, because the FMMO minimum may itself be driven downward by price manipulation because, as explained below,

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5. Trading on the NCE occurred only once a week for thirty minutes, and five or fewer sellers accounted for 87% of the sales. DATCP found that during 1974-1995, "less than 1% of total cheese production was sold on the [NCE]." Lodging at L76, L81, L85.

the FMMO price is itself a reflection of the market price cheese manufacturers will pay for milk.[6]

C. The Non-Preemptive Character of FMMOs

The AAA authorizes the Secretary of Agriculture to adopt federal marketing orders that establish minimum standards (or, as in the case of FMMOs, minimum prices) for any one of certain designated commodities. Each such order generally applies to only one such commodity, in one particular producing area, and only when approved by a sufficient percentage of the producers of the given commodity in the particular area. *See* App. at 29a-30a, 32a-33a, 49a-53a (7 U.S.C. §§ 608c(1), (3)-(4), (8)-(9), (11)).

Thus, marketing orders under the AAA, including FMMOs, differ significantly from the kind of federally mandated regulations that have been held to preempt a given field. First, marketing orders are largely voluntary. *See Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 148 (1963) ("The Act itself does not impose regulations over the marketing of any agricultural commodity. It merely provides the authority under which an industry can develop regulations to fit its own situation.")

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6. The section of the Wisconsin antitrust laws sued upon permits suit by an indirect party affected by the anticompetitive conduct alleged. *See* Wis. Stat. § 100.18. Here, the cheese manufacturers would be the "direct" parties that were injured by having been paid less for their cheese than they would have been paid absent the alleged anticompetitive conduct. Under the Wisconsin statute, sometimes called an "*Illinois Brick* repealer" to indicate a state deviation from the rule of *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), an "indirectly" injured party, such as a dairy farmer who sold his or her milk to the cheese manufacturer, can sue. There is no preemption issue raised concerning the Wisconsin antitrust laws themselves given this Court's decision in *California* v. *ARC Am. Corp.*, 490 U.S. 93 (1989).

Second, each marketing order is regional rather than national, and there is no requirement that every region be covered by an FMMO. *See* Lodging at L56 (noting that in 1994, there were 38 different FMMOs); *Grant's Dairy — Maine, LLC* v. *Comm'r of Me. Dep't of Agric., Food and Rural Res.*, 232 F.3d 8, 12 (1st Cir. 2000) ("Maine is not part of [any] federal order milk marketing area").

Milk sales in regions not covered by FMMOs may be subject to state regulation or may be completely unregulated. Currently, California and New York, among others, have state authorized milk marketing systems, with California's covering that entire state, and New York's covering the western portion of that state. As DATCP summarized the situation, "[s]eventy percent of U.S. milk was sold under the 38 Federal milk marketing orders in 1994; about 20 percent was sold under state orders." Lodging at L56.

Third, FMMOs set only minimum prices. *See Stark* v. *Wickard*, 321 U.S. 288, 291 (1944) ("The immediate object of the Act [as it applies to milk] is to fix minimum prices for the sale of milk by producers to handlers. It does not forbid sales at prices above the minimum."); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 138, 148 (1963) ("By its very terms, in fact, the statute purports only to establish *minimum* standards.") (emphasis in the original). Thus, even in a region covered by an FMMO, a state may impose an additional, higher, minimum price requirement. *See United Dairy Farmers Coop. Ass'n* v. *Milk Control Comm'n*, 335 F. Supp. 1008, 1013-15 (M.D. Pa. 1971) (existence of FMMO "does not preempt the jurisdiction of the Pennsylvania Milk Marketing Board to set minimum producer and resale prices in the same area"), *aff'd*, 404 U.S. 930 (1971).

D. Categories of Milk Sales Not Covered by FMMOs

The FMMO is clearly not intended to be a comprehensive federal standard for all milk sales that would preclude state regulation, because even in a region where an FMMO governs milk sales by producers, not all sales of milk by dairy farmers destined to become cheese are covered by the FMMO. Which sales are covered and which sales are not is determined, in the first instance, by the category (or "classification") of milk being sold. Milk is categorized as either Grade A, which can be used for a variety of purposes including drinking or making cheese, or Grade B, which is only suitable for making non-fluid products, such as cheese. *See* Lodging at L54.

Sales of Grade B milk are not subject to FMMOs. *See Ewald Bros., Inc.* v. *Mid-America Dairymen, Inc.*, 877 F.2d 1384, 1387 n.5 (8th Cir. 1989).

In addition, sales of Grade A milk where the sale of such milk is made to cooperatives which, in turn, manufacture cheese, are also not subject to FMMOs. *See* App. at 6a.

Approximately 80% of all milk sales by dairy farmers in Wisconsin, and an even larger percentage of milk sales by producers to cheese manufacturers, are *not* subject to FMMOs, principally because most of these sales are to cooperatives that own and operate cheese manufacturing plants. *See* App. at 27a.

In addition, sales of cheese itself, whether on the NCE or elsewhere, are not subject to FMMOs or to other price regulation.

E. The Market Nature of the FMMO Minimum Price

It has long been the policy of the United States Department of Agriculture ("USDA") that the FMMO minimum price for Grade A milk that is made into cheese (by processors other than

co-ops) is actually nothing more than a reflection of the market price for milk destined to become cheese.[7]

This market-based price is derived in two steps. First, a survey is taken of the prices of sales of Grade B milk — which, again, are unregulated — made during the previous month to selected *cheese* manufacturing plants, in order to determine the average price of such sales during the previous month. In short, the survey asks what cheese manufactures paid for milk that they would and could only use for cheese. *See* Lodging at L263, para. 6 (Agricultural Mktg Serv., Dairy Div., USDA, *Study of Alternatives to Minnesota-Wisconsin Price* (1991). Second, the previous month's average price of Grade B sales is "updated" in order to reflect the current price. *See id.* at L282.

Prior to 1995, the mechanism for updating the previous month's average price was a second, smaller survey of more recent prices and expected prices. The final, updated price was known as the "M/W Price." *See* Lodging at L56.

Since May 1995, the mechanism for updating the previous month's price has been based on the change in the value of milk that can be imputed from the change observed in the prices of cheese, butter and nonfat dry milk. The result is known as the "BFP Price". From May 1995 until May 1997, when the NCE closed, the price of cheese used in the BFP updater mechanism contained as its central factor the reported price of cheese on the NCE. *See id.*

Thus, unlike the kind of "rate" that the federal filed rate doctrine may, under conditions of preemption, prevent a litigant from challenging through a state cause of action, the FMMO minimum price involves no exercise of discretion on the part of

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7. Of course, this Court is entitled to ask for the views of the USDA through the Solicitor General to explain or clarify the USDA's long-held position.

any federal regulator, no attempt by any such regulator to subjectively determine what would be a "reasonable" rate, and no "evaluation" or "approval" of any rate submitted by any party being regulated. Rather, the FMMO minimum price results from the USDA merely gathering data over which it has no control, and, after May 1995, running the data through a formula whose purpose is to produce a result approximating the unregulated market price.

Importantly, the USDA's specific order covering Wisconsin under the AAA states in pertinent part:

> Both the industry and the Secretary view the M-W price as an accurate indictor of the value of milk in large part because the price reflects all of the supply and demand conditions that must be considered under section 608c(18).
>
> * * *
>
> The M-W price reflects a competitive *free market price* for raw farm milk and the explicit link between Grade B and Grade A surplus milk prices. Thus, the M-W price automatically incorporates the effects of innumerable economic factors which have an impact on both buyers and sellers including the relative price and availability of feed for dairy cows. Month-to-month changes in the *unregulated free market M-W price* (i.e., the price of Grade B milk) reflect changes in the overall supply and demand conditions for milk and its products nationally.
>
> * * *
>
> Use of the M-W price which, as noted above, is a competitive pay price, automatically indicates the basic value of milk and *eliminates the need for*

> *making possibly inaccurate judgments* concerning particular products, prices, yield factors and manufacturing allowances which otherwise would be used to calculate product price formulae.
>
> * * *
>
> As noted above, the M-W is a measure of supply and demand factors throughout the country.

Lodging at L340, L344 (Agricultural Mktg. Serv., USDA, *Milk in the New England and Other Mktg. Areas: Amplified Decision*, 59 Fed. Reg. 42422, *24-25, 27 (Aug. 17, 1994)) (emphasis added).

The USDA has also stated:

> The M/W Price is a measure of changes in supply and demand conditions throughout the country. *It is arrived at in the marketplace rather than by the Government*, although it is influenced by the price support level at times when prices are at or near the price support level.[8]

See Lodging at L314 (USDA, *The Federal Milk Marketing Order Program*, Mktg. Bulletin No. 27 (1989)) (emphasis added).

The USDA, with respect to the BFP price, also determined in the applicable order:

> The BFP essentially retains the features of the old M-W. *It is a market-determined price* ***free of government regulation*** that represents the basic value for milk and used to adjust Class I and Class II prices.

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8. It is not in dispute that during the relevant time period, the price of milk was not near the rock bottom price support level.

See Lodging at L357 (Agricultural Mktg. Serv., USDA, *Milk in the New England and Other Areas: Second Amplified Decision*, 61 Fed. Reg. 49081, *86 (Sept. 18, 1996)) (emphasis added).

Thus, it is the USDA's view that these prices are market determined prices without the application of any discretionary judgment by the USDA or anyone else.[9]

F. The Wisconsin Decision

The Wisconsin trial court concluded, that "[t]he FMMO program, in my opinion, is a *comprehensive regulatory scheme* based on a subjective and substantive reasonableness standard." App. at 25a. Then, although the trial court correctly noted that the federal filed rate doctrine can apply only in the context of field preemption, *see id.* at 19a ("[t]he filed rate doctrine has its roots in the Supremacy and Commerce Clauses [and] restrains a state's regulatory powers where Congress has assigned that function to a federal regulatory body"), the court went on to hold erroneously that "the FMMO program satisfies the requirements of a 'filed rate' for purposes of the filed rate doctrine," *id.* at 25a.

Like the trial court, the Wisconsin Court of Appeals also erroneously concluded that the FMMO minimum price involves some sort of "reasonableness" determination by a federal

9. There are three different but related FMMO minimum prices: (1) the minimum price paid by the buyer for milk that is used to make cheese, which is the M/W or BFP price, *see* Lodging at L56; (2) the minimum price paid by the buyer for milk of the highest quality (which can be used to make drinking milk) which, according to the USDA, differs from the M/W or BFP price by a differential that merely reflects the cost of transportation from the areas where such drinking milk is produced to the area where the buyer is located, *see* Lodging at L351 (differential is "largely reflective of the distance of the deficit market from the alternative supply areas"); and (3) the minimum price received by the dairy farmers, which is a weighted average or "blend price" of the different prices for milk with different uses, *see* Lodging at L56.

regulator. *See* App. at 12a n.5 ("to calculate the damages [Petitioner] claims to have sustained under these antitrust claims, a court would have to conclude that the USDA minimum pay prices is not reasonable"; "to do as [Petitioner] requests would necessarily involve us in determining a reasonable rate for that milk order"). The Court of Appeals then concluded that FMMOs have preempted the field of producer milk prices and that therefore Petitioners' damages are barred by the federal filed rate doctrine. *See id.* at 13a ("the milk orders attacked here were established as part of a federal program to which we are bound to apply the federal filed rate doctrine").[10]

In their Petition to the Wisconsin Supreme Court, Petitioners expressly argued, among other things, that the Wisconsin Court of Appeals had erroneously "applied preemption principles," (Plaintiffs-Appellants-Petitioners' Brief at 14), and that where, as here, "state regulation is not preempted by federal law, the federal filed rate doctrine cannot apply," (Plaintiffs-Appellants-Petitioners' Reply Brief at 6). Petitioners also argued that there is no basis for applying the filed rate doctrine to Petitioners' claims because, for the reasons explained *supra*, Petitioners "do not ask the Court to second-guess any discretionary price

10. The Wisconsin Decision did *not* hold that the filed rate doctrine would bar Petitioners' claims as a matter of *state* law. The Wisconsin Decision does note that the Wisconsin Supreme Court has "adopted the filed rate doctrine for state claims based on Wisconsin law if the claims seek damages by attacking a rate created by a comprehensive *state* program." *Id.* at 13a (emphasis added). But no such Wisconsin "state program" is implicated by Petitioners' claims, and the Wisconsin Decision made clear that it was only applying the *federal* filed rate doctrine. *See id.* ("the milk orders attacked here were established as part of a federal program to which we are bound to apply the *federal* filed rate doctrine") (emphasis added); 14a ("Wisconsin law provides no basis for concluding that we should not apply the *federal* filed rate doctrine to these federally established rates") (emphasis added).

determinations made by the USDA, because the USDA did not make any price determinations." Plaintiffs-Appellants-Petitioners' Brief at 23.

The Justices of the Wisconsin Supreme Court "equally divided on the question of whether the decision of the court of appeals should be affirmed or reversed," and, with Chief Justice Shirley S. Abrahamson in dissent, affirmed the Wisconsin Decision without issuing any further opinion. App. at 2a.[11]

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant Certiorari To Resolve The Conflict Between The Wisconsin Supreme Court And Both This Court And Every Other Court To Address The Issues

The linchpin of the Wisconsin Decision is the assumption that the AAA and the FMMOs create field preemption. The Court of Appeals, echoing the trial court, used classic field preemption language and analysis:

> at issue is a federally established rate [from] a Congressional scheme of uniform rate regulation . . .
>
> * * *
>
> the federal milk marketing orders at issue here were established by a federal agency . . . designed to implement a congressional scheme.

11. Paradoxically, the Court of Appeals stated in a footnote that "[m]ilk marketing orders can also be established through state milk marketing systems . . . [t]herefore, the federal government has not preempted the field for establishing milk orders." App. at 8a n.3. Nevertheless, the court justified application of the federal filed rate doctrine by analyzing the FMMOs as an expression of field preemption, arguing that the FMMOs are part of "a congressional scheme of uniform rate regulation," *id.* at 12a, and citing precedents of this Court "precluding state law claims" where, unlike here, no rate may be imposed "other than that established by the federal agency." *Id.* at 11a.

App. at 12a, 14a. The Court of Appeals then went on to state that

> the milk orders attacked here were established as part of a federal program to which we are bound to apply the federal filed rate doctrine . . .

App. at 13a. *Compare United States* v. *Locke*, 529 U.S. 89, 103, 12-15 (2000) (finding "field preemption" because "enactment of a uniform federal scheme displaces state law"); *Barnett Bank* v. *Nelson*, 517 U.S. 25, 31 (1996) ("intent to preempt state law" found where statute "create[s] a scheme of federal regulations 'so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it'" (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))); *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 142 (1990) (finding "express preemption" regarding regulation of employee benefit plans, where Congress intended "to ensure that plans and plan sponsors would be subject to a uniform body of benefits law").

This Court has held that "in deciding whether a federal law pre-empts a state statute, our task is to ascertain Congress' intent in enacting the federal statute at issue." *Morales* v. *TWA, Inc.*, 504 U.S. 374, 419 (1992); *accord Ingersoll-Rand Co.*, 498 U.S. at 138 ("purpose of Congress is the ultimate touchstone"). The Wisconsin Decision apparently describes the FMMO as "a federally established rate [from] a Congressional scheme of uniform rate regulation," and with additional similar language, because

> [i]n the absence of express pre-emptive language, Congress' intent to pre-empt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation.

Hillsborough County, Fla. v. *Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985).

Here, however, it is not true that "Congress 'left no room' for supplementary state regulation." Therefore field preemption is not present.

Most importantly, the Wisconsin Decision's holding that the field of milk marketing has been preempted directly conflicts with decisions of this Court and other federal precedents holding that the AAA and the FMMOs do not create field preemption. Thus, the analytical foundation for application of the federal filed rate doctrine collapses.

The clarity and magnitude of this error, coupled with the cloud that the Wisconsin Decision casts over the constitutionality of state regulation of milk marketing, warrants summary reversal.

A. The Court Should Grant Certiorari to Resolve the Conflict Between the Wisconsin Supreme Court and Both This Court and Other Federal Courts, Which Have Held That There is No Field Preemption under the AAA and its FMMOs

Because the Wisconsin Decision holds that the AAA and its FMMOs preempt the field of milk marketing, the decision conflicts with a long line of authorities of this Court and other precedents holding that there is no such preemption.

In *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 134-52 (1963), the Court squarely held that state regulation of the marketing of avocados under the same statutory section of the AAA implicated here was not preempted by federal marketing orders adopted pursuant to the AAA. Specifically, the Court considered whether, as applied to avocados grown in

Florida, a California regulation for determining the maturity of avocados "must be deemed displaced by the federal standard for determining the maturity of avocados grown in Florida." *Id.* at 134. The "federal standard" at issue was one embodied in marketing orders approved pursuant to 7 U.S.C. § 608c, *see id.* at 134 n.2, the same statutory provision under which FMMOs are authorized.

The *Florida Lime* Court first noted that "the readying of foodstuffs for market has always been deemed a matter of peculiarly local concern." *Id.* at 258. Then the Court drew a contrast between the AAA and the Federal Tobacco Inspection Act ["FTIA"] — the latter statute having been held to be preemptive:

> Nothing in the language of the [AAA] — passed by the same Congress [that passed the FTIA] the very next day — discloses a similarly comprehensive congressional design. . . . By its very terms, in fact, the [AAA] purports only to establish *minimum* standards.

Id. at 147 (emphasis in the original).[12]

Moreover,

> [t]he [AAA] itself does not impose regulations over the marketing of any agricultural commodity. It merely provides the authority under which an industry can develop regulations to fit its own situation and solve its own marketing problems.

Id. at 148.

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12. To support its reference to "minimum standards," the *Florida Lime* court referenced language in 7 U.S.C. § 602(3), which applies to avocados. For milk, the statutory analogue to section 602(3) is section 608c(5).

Therefore, the California regulation had not been preempted, even as applied to Florida grown avocados. *Id.* at 152. The Wisconsin Decision's holding that the AAA and its FMMOs filed preempt state milk regulation is thus directly contrary to this Court's holding in *Florida Lime* and should be summarily reversed.

The Wisconsin Decision also conflicts with two district court decisions affirmed by this Court that specifically held that state regulation of milk marketing is not preempted. *See Schwegmann Bros. Giant Super Mkts.* v. *Louisiana Milk Comm'n*, 365 F. Supp. 1144, 1156-57 (M.D. La. 1973) ("this court holds that Congress has not pre-empted . . . the field of milk marketing"), *aff'd*, 416 U.S. 922 (1974); *United Dairy Farmers Coop. Ass'n* v. *Milk Control Comm'n*, 335 F. Supp. 1008, 1013-15 (M.D. Pa. 1971) (existence of FMMO "does not preempt the jurisdiction of the Pennsylvania Milk Marketing Board to set minimum producer and resale prices in the same area"), *aff'd*, 404 U.S. 930 (1971).

The Wisconsin Decision also creates a split of authority with courts in the First Circuit, including the First Circuit Court of Appeals. In *Grant's Dairy — Maine, LLC* v. *Comm'r of Me. Dep't of Agric., Food & Rural Res.*, 232 F.3d 8, 18 (1st Cir. 2000), the First Circuit rejected a Supremacy Clause challenge to the Maine Milk Commission Act. Purchasers in *Grant's Dairy* argued that there was a conflict between the Maine law and federal law, because the Maine law sets a uniform price to be paid to all Maine milk producers regardless of the purchaser's location, whereas FMMO prices are "subject to an adjustment based on the location of the [purchaser's] plant." *Id.* at 12. The purchasers in *Grant's Dairy* were subject to both the federal and state regulations because, under Maine law, even purchasers who are subject to FMMOs because they make a certain percentage of their purchases outside of Maine must still comply

with the Maine minimum when purchasing Milk from producers located in Maine. *Id.* at 13. However, the First Circuit held that there was no conflict between the federal and state programs, because, *inter alia*, "prices higher than the federal minima are not fundamentally incompatible with the objectives of the federal regulatory scheme," and "*the great weight of authority holds that state regulation of milk prices is not preempted by the extant federal regime.*" *Id.* at 17-18 (emphasis added).

Other decisions from courts in the First Circuit have also held that state regulation of milk marketing is not preempted. *See H.P. Hood, Inc.* v. *Comm'r of Agric., Food & Rural Res.*, 764 F. Supp. 662, 675-76 (D. Me. 1991) ("generic state interests are not preempted by the federal milk laws"); *Crane* v. *Comm'r of Dep't of Agric., Food & Rural Res.*, 602 F. Supp. 280, 293 (D. Me. 1985) (no likelihood of success on claim that state regulations resulting in certain milk producers "receiving prices for their milk above the uniform prices established by the Federal Order" are preempted).

The Wisconsin Decision also conflicts with the intrinsic logic of *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186 (1994), and similar cases. *West Lynn* struck down a pricing order of the Massachusetts Department of Food and Agriculture — a state in the First Circuit — on Commerce Clause grounds, without ever mentioning preemption or the Supremacy Clause — which ground would have been dispositive had it applied. *Id.* at 204. This was despite the fact that, according to this Court, "the Massachusetts order regulates a portion of the same interstate market in milk that is more broadly regulated by a federal milk marketing order which covers most of New England." *Id*

Indeed, the Wisconsin Decision also conflicts with decisions by the federal district courts with jurisdiction over Wisconsin, which also have held that state regulation of milk marketing is not preempted. *See Dean Foods Co.* v. *Tracy*, 990 F. Supp.

646, 647, 656 (W.D. Wis. 1997) (rejecting Supremacy Clause challenge to Wisconsin regulations that provide that "farmers who deliver larger volumes of milk [receive] more revenue per unit of delivered milk"); *Crave* v. *Tracy*, 955 F. Supp. 1047, 1065-66 (E.D. Wis. 1996) (no likelihood of success on preemption claim because no showing "that Congress intended exclusive federal regulation of all aspects of milk pricing"). The fact that the Wisconsin Decision conflicts with prior holdings of the Wisconsin federal district courts creates an intra-jurisdictional conflict that could lead to forum shopping and confusion about the legitimacy of any regulation of milk marketing by the state of Wisconsin. The Court should intervene now to prevent the development of such an intra-jurisdictional conflict.[13]

B. The Court Should Grant Certiorari to Resolve The Conflict Between the Wisconsin Supreme Court's Decision and This Court's Prior Holdings that Where State Regulation is Not Preempted by Federal Law, the Federal Filed Rate Doctrine Cannot Apply

Prior holdings of this Court make clear that the federal filed rate doctrine cannot apply where state regulation is not preempted by federal law. Those precedents show that preemption and the filed rate doctrine are cognate concepts which are necessarily interrelated. In these decisions, the

13. *See also Medo-Bel Creamery, Inc.* v. *Oregon*, 65 Or. App. 614, 673 P.2d 537 (Or. Ct. App. 1983) ("we therefore hold that Congress did not intend to preempt the field of setting milk prices"). In *Knevelbaard Dairies* v. *Kraft Foods, Inc.*, 232 F.3d 979 (9th Cir. 2000), some of the underlying conduct was the same as alleged here. As to the filed rate doctrine, the court held that "[t]his case . . . involves only a *state* antitrust law . . . [and] there is no reason to think that California would apply the filed rate doctrine that it has so clearly rejected." *Id.* at 992-93 (emphasis added).

question whether the filed rate doctrine applies by operation of federal law to bar a state statute or regulatory action from having effect is treated as part of the same question as whether the state statute or regulatory action has itself been preempted.

In *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986), federal and state regulators used different methodologies to calculate a utility's costs for purchasing power wholesale. In a wholesale ratemaking proceeding, the Federal Energy Regulatory Commission ("FERC") mandated that a certain methodology be used based on its interpretation of how power was being allocated under a contract between the utility and the Tennessee Valley Authority ("TVA"), but, in a retail ratemaking proceeding, the Utilities Commission of North Carolina chose a different methodology. The utility argued that application of the state commission's methodology "is inconsistent with the 'filed rate' doctrine." *Id.* at 962

The Court answered the utility's argument by first determining that the contract between the utility and the TVA was one "over which FERC clearly had *exclusive* jurisdiction," *id.* at 966 (emphasis added), and then by holding that the state ratemaking order was "preempted by federal law," *id.* at 955. In a later case, the Court would recall that "[o]ur decision in *Nantahala* relied on fundamental principles concerning the pre-emptive impact of federal jurisdiction." *Mississippi Power & Light Co.* v. *Mississippi*, 487 U.S. 354, 371 (1988).

The *Nantahala* Court then resumed its analysis in terms of the filed rate doctrine, stating that

> [t]he similarity between this case and the *more typical application of the filed rate doctrine is apparent* from the impermissible interference that enforcement of NCUC's order would create with the scheme of federal regulation.

476 U.S. at 956 (emphasis added). Then the Court made the following statement:

> In *Chicago & North Western Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), the Court similarly noted that the filed rate doctrine as applied to the actions of the [ICC] assisted in the enforcement of the supremacy of federal law: "The common rationale of these cases is easily stated: '[There] can be no divided authority over interstate commerce. . . .'"

Id. at 953 (citation omitted).

Significantly, although the quotation from *Chicago & North Western* is said by the *Nantahala* Court to be about "the filed rate doctrine," the phrase "filed rate" does not even appear in *Chicago & North Western*. Rather, the entire *Chicago & North Western* case, and the specific language quoted by the *Nantahala* Court, is about the issue of preemption. In other words, in relying on and quoting from *Chicago & North Western*, the *Nantahala* Court was treating the "filed rate doctrine" and "preemption" as wholly interchangeable concepts.

Similarly, in *Mississippi Power & Light Co.* v. *Mississippi*, 487 U.S. 354 (1988), a utility's accounting allocation of its purchases made from various wholesale power sources was again at issue. In a single paragraph describing the principles that "compel[led]" its holding, the *Mississippi Power* Court spoke alternately of the "fundamental principles concerning the pre-emptive impact of federal jurisdiction" and what "[t]he filed rate doctrine ensures." *Id.* at 371-72. Relying on *Nantahala*, and specifically noting that decision's conclusions about the filed rate doctrine, the *Mississippi Power* Court nevertheless issued its holding in terms of preemption:

> The Mississippi Supreme Court erred in adopting the view that the pre-emptive effect of FERC jurisdiction turned on whether a particular matter was actually determined in the FERC proceedings. . . . Congress has drawn a bright line between state and federal authority in the setting of wholesale rates and in the regulation of agreements that affect wholesale rates. . . . Mississippi, therefore, may not consistent with the Supremacy Clause conduct any proceedings that challenge the reasonableness of FERC's allocation.

487 U.S. at 374.

In a concurring opinion, Justice Scalia also spoke in terms of preemption,

> What the case comes down to, then, is whether FERC's asserted jurisdiction . . . is supported by the provisions of the Federal Power Act. If so, *there is no regulatory gap for the States to fill*, and they are *pre-empted* from examining that question of prudence in calculating the rates chargeable to retail customers.

487 U.S. at 380 (emphasis added).

In *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 573-74 (1981) the Court again made clear that whether a damage award is barred by the "filed rate doctrine" turns on whether state regulation was preempted by the federal scheme. In that case, a purchaser of natural gas leases filed rates with the FERC that the purchaser had obtained under its contract, but subsequently, a most favored nations clause in the contract was triggered, imposing a contractual requirement that the purchaser make payments at a rate higher than the one filed with FERC. *Id.* at 574. The purchaser failed to increase its payments or to

inform the seller that the most favored nations clause had been triggered, and because the seller had not been informed of the change, the seller made no attempt to file a new rate with FERC. *Id.* at 574-5. However, when the seller finally did become aware that the most favored nation clause had been triggered, the seller sued in state court for breach of contract, and, ultimately, was awarded damages. *Id.*

The Court stated the question presented as whether such an award of damages was forbidden by the "filed rate doctrine." *Id.* at 573. The Court then answered this question in terms of preemption analysis, finding that "Congress here has granted exclusive authority over rate regulation to the Commission," noting that in a prior, similar case the Court had held that "the common-law action was pre-empted," observing that the state court had "usurped a function that Congress has assigned to a federal regulatory body," and concluding that "[t]his the Supremacy Clause will not permit." *Id.* at 580-82. When plaintiffs appealed to equitable considerations, the Court discounted "the fact that the state law has been violated," reasoning that "[e]very preemption case involves a conflict between a claim of right under federal law and a claim of right under state law." *Id.* at 583-84.

Thus, the decisions of this Court recognize that the questions of preemption and whether the filed rate doctrine applies to bar state damages causes of action are interrelated and interdependent.[14]

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14. *See United Cities Gas Co.* v. *Illinois Commerce Comm'n*, 163 Ill. 2d 1, 26, 643 N.E.2d 719, 731 (1994) ("filed rate doctrine . . . is a rule of Federal preemption").

Where, as here, there is no federal field preemptive effect, the filed rate doctrine cannot be a bar. Accordingly, the Wisconsin Decision conflicts with the prior constitutional holdings of this Court and should be summarily reversed.[15]

II. The Court Should Grant Certiorari To Resolve The Conflict Between The Wisconsin Supreme Court And The Long-Established Policy Of The United States Department Of Agriculture

Certiorari will be granted when a decision is "inconsistent with long-established policy" of a federal agency. *Morton* v. *Ruiz*, 415 U.S. 199, 201-02 (1974) (appellate court's decision on important issue was in conflict with policy of Bureau of Indian Affairs); *see Albertson's Inc.* v. *Kirkingburg*, 527 U.S. 555, 577-78 (1999) (where appellate court's decision essentially interpreted the Americans with Disabilities Act such that an employer would have been burdened with justifying a job qualification that merely required employees to satisfy a regulation of the Department of Transportation, certiorari granted and decision reversed); *Patterson* v. *Lamb*, 329 U.S. 539, 542 (1947) (certiorari granted because appellate court's decision "upset twenty-five years of important War Department rulings and practices").

Here, the Wisconsin Decision's holding that the filed rate doctrine barred Petitioners' claims conflicts with the

15. The Court should grant certiorari not only because the Wisconsin Decision conflicts with precedents of this Court and other courts, but also, because whether the AAA preempts state regulation of milk marketing, and whether the federal filed rate doctrine may apply in the absence of preemption, like other questions of preemption, are important questions of federal law. *See, e.g., Chicago & North Western Transp. Co.* v. *Kalo Brick & Title Co.*, 450 U.S. 311 (1981) (where issue was whether state law claims were preempted by Interstate Commerce Act, and where appellate court apparently was first such court to address the issue, certiorari granted).

long-established policy of the USDA that the FMMO minimum price is not set by a discretionary agency judgment about reasonable prices, but instead is "arrived at in the market-place rather than by the Government," and therefore is a "market-determined price free of government regulation." *See supra*, Statement of the Case, Part E. This policy was articulated by the USDA at least as long ago as 1989. *See* Lodging at L294-L333 (USDA, *The Federal Milk Marketing Order Program*, Marketing Bulletin No. 27 (updated Jan. 1989)). Since then, the provision of the Act governing FMMOs has been amended *five* times, and Congress has never used its power of amendment to disturb the USDA's policy that the procedure for determining the FMMO minimum is non-discretionary. *See* U.S.C.A. 7 § 608c, Historical and Statutory Notes (West 1999 & Supp.) (listing amendments in 2001, 1999, 1992, 1991 and 1990); *United States* v. *Cleveland Indians Baseball Co.*, 532 U.S. 200, 220 (2001) ("Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law").

Under the USDA's policy, even assuming, *arguendo*, that the Act and its FMMOs preempt state regulation of producer milk prices, FMMO minimum prices do not result from the kind of regulatory discretion and subjective judgments of reasonableness that could form the basis for an application of the federal filed rate doctrine. Using the FMMO minimum price in a calculation of damages resulting from the Cheese Processors' manipulation of cheese prices would require no judgment whatsoever about reasonableness and no second-guessing of any decisions made by the USDA.

Not only does the Wisconsin Decision conflict with USDA policy, but it also "runs roughshod over the established proposition that an agency's construction of its own regulations

is entitled to substantial deference." *Lyng* v. *Payne*, 476 U.S. 926, 939 (1986) (reversing judgment against Secretary of Agriculture); *accord Cleveland Indians*, 532 U.S. at 220 ("agency's longstanding interpretation of its own regulations . . . attracts substantial judicial deference"); *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504 512 (1994) (same); *Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 150 (1991) (same).

Indeed, where, as here, a decision fails to accord appropriate deference to a federal agency, that decision may be *summarily* reversed. *See Immigration & Naturalization Serv.* v. *Miranda*, 459 U.S. 14, 16, 19 (1982) (summarily reversing judgment against agency because proof of agency's "affirmative misconduct" was lacking and "[a]ppropriate deference must be accorded its decisions").

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari to the Wisconsin Supreme Court to summarily reverse the decision, or, alternatively, to grant plenary review of the questions presented in this Petition.

Respectfully submitted,

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APPENDIX

APPENDIX A — DECISION OF THE SUPREME COURT OF THE STATE OF WISCONSIN, FILED APRIL 30, 2002

2002 WI 42

No. 99-3199
(L.C. No. 97 CV 1212, 97 CV 1777, 97 CV 1885)

STATE OF WISCONSIN: IN SUPREME COURT

James Servais, Douglas Pierce, William R. Dobson, Roger Noll, Rita Noll, Byron Krueger, Melvin Schmitz, and Roger Swanson,

Plaintiffs-Appellants-Petitioners,

v.

Kraft Foods, Inc., National Cheese Exchange, Inc., and Alpine Lace Brands, Inc.,

Defendants-Respondents.

William R. Dobson,

Plaintiff-Appellant-Petitioner,

v.

Kraft Foods, Inc., and National Cheese Exchange, Inc.,

Defendants-Respondents.

Appendix A

Roger Noll, Rita Noll, Byron Krueger, Melvin Schmitz, and Roger W. Swanson,

Plaintiffs-Appellants-Petitioners,

v.

Kraft Foods, Inc., National Cheese Exchange, Inc., Borden, Inc., and Alpine Lace Brands, Inc.,

Defendants-Respondents.

REVIEW of a decision of the Court of Appeals. *Affirmed.*

¶1 PER CURIAM. This is a review of a published decision of the court of appeals. *Servais v. Kraft Foods*, 2001 WI App 165, 246 Wis. 2d 920, 631 N.W.2d 629, that affirmed a judgment of the Circuit Court for Dane County, P. Charles Jones, Judge. The court is equally divided on the question of whether the decision of the court of appeals should be affirmed or reversed. Justices N. PATRICK CROOKS, DAVID T. PROSSER, and DIANE S. SYKES would affirm; Chief Justice SHIRLEY S. ABRAHAMSON and Justices WILLIAM A. BABLITCH and ANN WALSH BRADLEY would reverse. Justice JON P. WILCOX dis not participate. Accordingly, the decision of the court of appeals is affirmed.

APPENDIX B — DECISION OF THE COURT OF APPEALS OF WISCONSIN, DATED AND FILED JUNE 28, 2001

June 28, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-3199

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

97-CV-1212

JAMES SERVAIS, DOUGLAS PIERCE, WILLIAM R. DOBSON, ROGER NOLL, RITA NOLL, BYRON KRUEGER, MELVIN SCHMITZ, AND ROGER SWANSON,

PLAINTIFFS-APPELLANTS,

V.

KRAFT FOODS, INC., NATIONAL CHEESE EXCHANGE, INC., AND ALPINE LACE BRANDS, INC.,

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Appendix B

97-CV-1777

WILLIAM R. DOBSON,

PLAINTIFF-APPELLANT,

v.

KRAFT FOODS, INC., AND NATIONAL CHEESE EXCHANGE, INC.,

DEFENDANTS-RESPONDENTS.

97-CV-18852

ROGER NOLL, RITA NOLL, BYRON KRUEGER, MELVIN SCHMITZ, AND ROGER W. SWANSON,

PLAINTIFFS-APPELLANTS,

v.

KRAFT FOODS, INC., NATIONAL CHEESE EXCHANGE, INC., BORDEN, INC., AND ALPINE LACE BRANDS, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dane County: P. CHARLES JONES, Judge. *Affirmed.*

Before Roggensack, Deininger and Lundsten, JJ.

Appendix B

ROGGENSACK, J. The appellants' claims attack milk marketing orders that were established by a federal agency through formal rulemaking designed to implement a congressional scheme. Therefore, they determine lawful rates. Because the filed rate doctrine precludes suits for damages developed through attacks on such lawful rates, whether the claims for relief arise under state or federal law, we conclude that the filed rate doctrine bars the appellants' action. Additionally, because the appellants have made no showing of a method of damage calculation that would not be based on the difference between the milk orders the United States Department of Agriculture (USDA) established and what appellants contend they should have been, we do not address their assertion that they can calculate damages without attacking the USDA milk order pay prices. Accordingly, we affirm the judgment of the circuit court.

BACKGROUND

The appellants in this action, James Servais, Douglas Pierce, William R. Dobson, Roger Noll, Rita Noll, Byron Krueger, Melvin Schmitz, and Roger Swanson (hereinafter Servais), are dairy farmers who claim to have been adversely affected by federal regional milk orders for the areas in which they are producers of raw milk. They brought this suit under Wisconsin's antitrust law,[1] alleging that through a manipulation of prices paid on the National Cheese Exchange and

1. Other state law claims were pled. However, they were dismissed prior to the circuit court's granting summary judgment on the appellants' antitrust claims. The dismissal of those claims has not been addressed by the appellants on appeal.

elsewhere, the defendants, Kraft Foods, Inc., National Cheese Exchange, Inc., Borden, Inc. and Alpine Lace Brands, Inc. (hereinafter Kraft), were able to lower the milk orders' minimum pay prices for milk producers in their areas because the orders were calculated in part through the use of manipulated data. They contend that the lower prices affected what they were paid, both by handlers, who were subject to milk orders, and by co-ops, who were not subject to milk orders but did pay milk producers in accord with prevailing market rates that were affected by the milk orders. They seek monetary damages.

Kraft claims that no such manipulation occurred, but even if it did, this action for damages cannot go forward because the milk orders at issue here were established through a comprehensive federal scheme and therefore, the filed rate doctrine bars actions to recover damages based on the alleged invalidity of the rates established in those orders. As a counter to that argument, Servais claims that this is a state antitrust action, not a federal antitrust action, and therefore, the filed rate doctrine is inapplicable. Servais also claims that, because co-ops are not regulated by milk orders,[2] damages computed by reference to payments made by them should be available under the antitrust violations alleged. Servais cites a Ninth Circuit case, ***Knevelbaard Dairies v. Kraft Foods, Inc.***, 232 F.3d 979 (9th Cir. 2000), which appellants contend has permitted a similar action to go forward.

The circuit court reviewed the arguments of the parties and dismissed Servais's claims on summary judgment,

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2. 7 U.S.C. § 608c(5)(F).

reasoning that the filed rate doctrine precludes antitrust claims for damages, whether they involve payments to farmers by a milk handler who was subject to a milk order or by a co-op that was not subject to a milk order, because both would necessarily attack the rate set by the USDA, an attack precluded by the filed rate doctrine. Servais appealed the dismissal. In their oral argument before this court, the appellants also claimed that they could calculate their damages without attacking the pay price set in milk orders. However, they did not explain how that would be accomplished, and the record in the circuit court is similarly uninformative.

DISCUSSION

Standard of Review.

We apply the same summary judgment methodology as the circuit court. ***Cemetery Servs., Inc. v. Department of Regulation & Licensing***, 221 Wis. 2d 817, 823, 586 N.W.2d 191, 194 (Ct. App. 1998). We first examine the complaint to determine whether it states a claim and then review the answer to determine whether it joins a material issue of fact or law. ***Id.*** If we conclude that the complaint and answer are sufficient to join issue, we examine the moving party's affidavits to determine whether they establish a *prima facie* case for summary judgment. ***Id.*** If they do, we look to the opposing party's affidavits to determine whether there are any material facts in dispute that entitle the opposing party to a trial. ***Id.***

Appendix B

Whether the filed rate doctrine requires dismissal of appellants' antitrust claims is a question of law, which we review *de novo*. ***Prentice v. Title Ins. Co. of Minnesota***, 176 Wis. 2d 714, 721, 500 N.W.2d 658, 660 (1993).

Federal Milk Marketing Orders.[3]

Federal milk marketing orders were designed to promote orderly market conditions for the sale and the supply of milk. 7 U.S.C. §§ 602(1) and 608c(5). They are creatures of the Agricultural Marketing Agreement Act of 1937, as amended,[4] and, to some extent, the preceding Agricultural Adjustment Acts of 1933 and 1935. The immediate object of the Act was to fix minimum prices to be paid to milk producers by handlers and to establish consistent supplies for consumers. 7 U.S.C. § 602. This is accomplished through complex marketing orders.

> Each order includes provisions for a classified pricing plan, a system of minimum class prices, and a plan for payment of uniform prices to producers and provisions for administering the order. Although an order considers the particular requirements of an individual market, it is closely coordinated among all markets.

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3. Milk marketing orders can also be established through state milk marketing systems. *See e.g.*, ***Knevelbaard Dairies v. Kraft Foods*, Inc.**, 232 F.3d 979 (9th Cir. 2000). Therefore, the federal government has not preempted the field for establishing milk orders, and cases such as ***Florida Lime & Avocado Growers, Inc. v. Paul***, 373 U.S. 132 (1963), which turn on whether preemption has occurred, are not helpful to our analysis.

4. 7 U.S.C. § 601 et seq.

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THE FEDERAL MILK MARKETING ORDER PROGRAM, Marketing Bulletin Number 27, pg.6, United States Dep't of Agriculture. While establishing a minimum pay price for milk, the Act specifically does not forbid the payment of prices above the minimum set by a milk order. ***Stark v. Wickard***, 321 U.S. 288, 291 (1944).

The Act authorizes the Secretary of the Department of Agriculture to hold hearings when milk orders are proposed to be implemented or amended. 7 U.S.C. § 608c. The USDA is responsible for judging the merits of proposed orders based on evidence presented at a public hearing. Marketing Bulletin Number 27, pg. 11. The USDA's *Rules of Practice and Procedures* determine prehearing, as well as hearing, procedures. ***Id.*** at 12.

Generally, a new milk order is proposed by dairy farmers, but it may also be proposed by other persons, such as milk handlers and the Secretary of the Department of Agriculture. ***Id.*** When the USDA receives a proposal for a new or amended order, the rulemaking process begins. The USDA assigns one of its marketing specialists to study the proposed order. After the prehearing study has been completed and it indicates that a new or amended milk order may be warranted, a public hearing is held to receive evidence about "economic and marketing conditions that relate to the handling of milk in the marketing area for which a Federal milk order is proposed." ***Id.*** at 14. Subsequent to the hearing, a recommended decision is prepared by USDA marketing specialists and published in the *Federal Register.* It is also mailed to anyone who was present at the public hearing and anyone known to be interested in the decision, such as area milk producers

and milk handlers. ***Id.*** at 16. Before a new order or an amended order may take effect, it must receive approval from milk producers in that region, with the requisite amount of approval dependent on the type of order at issue. In a like manner, an already existing order may also be amended through formal USDA rulemaking. ***Id.*** at 18.

Filed Rate Doctrine.

*1. **Overview.***

The filed rate doctrine is a concept created by the United States Supreme Court in ***Keogh v. Chicago N. W. Ry. Co.***, 260 U.S. 156 (1922). ***Keogh*** addressed whether rates for common carriers, which may have been fixed at a higher level as the result of a conspiracy between carriers but had been approved as non-discriminatory and reasonable by the Interstate Commerce Commission, could be attacked by a private shipper under federal antitrust law. The court explained that rates set by the commission must be stringently applied to prevent unjust discrimination, which was Congress's paramount purpose in authorizing the commission to set them. ***Id.*** at 163. The court reasoned that because the filed rate was the legal rate, it could not be discriminatory. ***Id.*** at 164. Furthermore, the right defined by the tariff could not be varied or enlarged either by contract or by tort. ***Id.*** at 163.

The Supreme Court also reasoned that an injury implied the violation of a legal right and because the "instrument by which Keogh is alleged to have been damaged are rates approved by the Commission" he was not claiming an injury

that implicated the violation of a legal right. ***Id.*** at 161. Stated another way, legal rights are established by the commission's set rates, which are reasonable as a matter of law. The concern about not getting underneath the commission's rates involved the justiciability of determining "reasonable rates," which the Supreme Court has continued to hold that courts must avoid as impermissible judicial rate-making. ***Montana-Dakota Utilities Co. v. Northwestern Pub. Serv. Co.***, 341 U.S. 246, 251-52 (1951).

While we note that ***Keogh*** was decided when common carriers were restricted by federal legislation and that deregulation has since taken place, its dual concerns of avoiding discriminatory rates and of avoiding judicial rate-making have retained their importance in analyzing attacks on rates set by federal agencies and have caused the filed rate doctrine to be applied in many other contexts. *See, e.g.*, ***AT&T v. Central Office Tel., Inc.***, 524 U.S. 214 (1998) (holding that the filed rate doctrine applies to the Communication Act's filed-tariff requirements, precluding state law claims); ***Arkansas Louisiana Gas Co. v. Hall***, 453 U.S. 571 (1981) (holding that a natural gas producer could not sue a buyer of natural gas for breach of contract damages because to do so would cause the court to impose a rate other than that established by the federal agency); ***Stark v. Wickard***, 321 U.S. 288 (1944) (holding that while damages which may have resulted from a milk order which was alleged to be unfair to certain producers could not be maintained due to the filed rate doctrine, an action for an injunctive relief was not prohibited).

2. The Servais Claims.

The parties do not dispute that the milk orders challenged in this action were established through formal USDA rulemaking, as part of the federal program outlined above. From that rulemaking process, a minimum pay price was established that is, as a matter of law, the reasonable rate and therefore the lawful minimum price for those who opted into the federal milk marketing program. *See* ***Arkansas Louisiana Gas,*** 453 U.S. at 577.

To calculate the damages Servais claims to have sustained under these antitrust claims, a court would have to conclude that the USDA minimum pay price is not reasonable and to speculate what price the USDA would have set for milk orders if the alleged price manipulation at the National Cheese Exchange[5] had not occurred. However, because the milk order at issue is a federally established rate, such speculation would undermine a congressional scheme of uniform rate regulation and award as damages a dollar amount based on a new milk price never established by the USDA. This cannot occur because the filed rate doctrine precludes substituting the judgment of a court for what constitutes a reasonable

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5. Servais claims that the manipulation was not solely of the National Cheese Exchange prices. However, that assertion does not change our analysis because we cannot look underneath the minimum pay prices set in the milk orders, regardless of the acts alleged to have caused an invalid price. To do as Servais requests would necessarily involve us in determining a reasonable rate for that price, and this we cannot do. ***Arkansas Louisiana Gas Co. v. Hall,*** 453 U.S. 571, 577 (1981).

minimum pay price for the judgment of the USDA, even when the claim for damages is based on state law. ***Arkansas Louisiana Gas***, 453 U.S. at 579.

Servais contends that because *Kuevelbaard Dairies*, a case brought in the federal courts of California where a milk order was attacked based on allegations similar to those presented here, has been allowed to proceed, we should conclude that the filed rate doctrine does not preclude this action for antitrust damages. We disagree. ***Knevelbaard Dairies*** arises from a milk order established by an agency of the State of California, not one established by a federal agency. ***Knevelbaard Dairies***, 232 F.3d at 982. As the Ninth Circuit acknowledged, "This case . . . involves only a *state* antitrust law being applied where an *agency of that state* has set a commodity price that, according to the complaint, was wrongfully depressed by manufacturers who collusively manipulated data submitted to and used by the agency." ***Id.*** at 992 (emphasis in the original). That the milk order at issue was not set by a federal agency is critical to the court's conclusion that it was not bound to apply the federal filed rate doctrine, as the emphasis it placed in its reasoning quoted above demonstrates. In contrast, the milk orders attacked here were established as part of a federal program to which we are bound to apply the federal filed rate doctrine.

Additionally, the Wisconsin Supreme Court has already adopted the filed rate doctrine for state claims based on Wisconsin law if the claims seek damages by attacking a rate created by a comprehensive state program. ***Prentice***, 176 Wis. 2d at 725, 500 N.W.2d at 662. It has approved the concept and adopted the reasoning of ***Keogh***, which supports

it, as its own. ***Prentice*** at 725-26, 500 N.W.2d at 662-63. Therefore, Wisconsin law provides no basis for concluding that we should not apply the federal filed rate doctrine to these federally established rates. Accordingly, we conclude that the circuit court did not err when it granted summary judgment to Kraft dismissing appellants' complaint, and we affirm its judgment.

CONCLUSION

Because the federal milk marketing orders at issue here were established by a federal agency through formal rulemaking designed to implement a congressional scheme, they determine lawful rates. And because the filed rate doctrine precludes suits for damages developed through attacks on such lawful rates, whether the claims for relief arise under state or federal law, we conclude that the filed rate doctrine bars the appellants' action herein. Additionally, because the appellants have made no showing of a method of damage calculation that would not be based on the difference between the milk orders the USDA established and what appellants contend they should have been, we do not address their assertion that they can calculate damages without attacking the USDA milk order pay prices. Accordingly, we affirm the judgment of the circuit court.

By the Court. — Judgment affirmed.

Recommended for publication in the official reports.

APPENDIX C — ORAL DECISION OF THE CIRCUIT COURT OF THE STATE OF WISCONSIN, DANE COUNTY, DATED OCTOBER 15, 1999

CIRCUIT COURT
BRANCH 3
STATE OF WISCONSIN DANE COUNTY

Consolidated
Case No. 97-CV-1212

JAMES SERVAIS and DOUGLAS PIERCE,

Plaintiffs,

- vs -

KRAFT FOODS, INC., and NATIONAL CHEESE EXCHANGE, INC.,

Defendants.

Consolidated
Case No. 97-CV-1885

ROGER NOLL, RITA NOLL, BYRON KRUEGER, MELVIN SCHMITZ, ROGER W. SWANSON,

Plaintiffs,

- vs -

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KRAFT FOODS, INC., NATIONAL CHEESE EXCHANGE, INC., BORDEN, INC., and ALPINE LACE BRANDS, INC.,

Defendants.

Consolidated
Case No. 97-CV-1777

WILLIAM R. DODSON,

Plaintiff,

- vs -

KRAFT FOODS, INC. and NATIONAL CHEESE EXCHANGE, INC.,

Defendants.

ORAL DECISION

DATE: October 12, 1999

BEFORE: THE HONORABLE P. CHARLES JONES
Dane County Circuit Court, Branch 3
Reserve Judge

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THE COURT: The matter before the court at this time is James Servais and Douglas Pierce, William Dodson, Roger Noll, Rita Noll, Byron Krueger, Melvin Schmitz and Roger W. Swanson, plaintiffs, versus Kraft Foods, Inc., National Cheese Exchange, Inc., Borden, Inc., and Alpine Lace Brands, Inc., three consolidated cases, 97-CV-1212, 97-CV-1885, and 97-CV-1777. We'll begin with the appearances on behalf of the plaintiffs.

MR. STOKER: Your Honor, Michael Stoker appears locally on behalf of Johns, Flaherty & Rice in LaCrosse.

Mr. GUSTAFSON: Dan Gustafson or Heins, Mills & Olson on behalf of plaintiff.

MR. DUBBS: Good afternoon. Thomas Dubbs from Goodkind, LaBaton, Rudoff & Sucharow in New York, also for the plaintiff. Hollis Saltzmann from that firm as well.

MR. WEXLER: Good afternoon. Ken Wexler and Jennifer Sprengel on behalf of the Miller, Faucher firm in Chicago.

MR. CAIN: Good afternoon. Michael Cain from the law firm of Liebengerg & White in Philadelphia for plaintiffs.

THE COURT: And on behalf of Kraft Foods.

MR. SMITH: On behalf of Kraft Foods, this is Tefft Smith and I have Robbie Robertson on the line with me as well. And I'm assuming, Your Honor, this is being transcribed.

THE COURT: It is, yes. And is there a representative from the National Cheese Exchange?

MR. FISCHER: Good afternoon. Michael Fischer and Michael Halfenger of Foley and Lardner.

THE COURT: And Borden.

MR. BLANCHARD: Michael Blanchard of Quarles & Brady joins Mr. Smith's team.

THE COURT: And Borden, Inc.

MR. ZESSAR: Yes, Your Honor. Good afternoon. This is Bruce Zessar of Sidley & Austin representing Borden. Along with me is Michael Bess.

THE COURT: And finally, Alpine Lace Brands.

MR. MABIE: Last, but not least, Dean Mabie from the Reinhart, Boerner, Van Deuren, Norris & Rieselbach law firm.

THE COURT: Thank you. Does that complete all the appearances? The matter is being transcribed. It is set on for an oral ruling and I am going to issue my decision orally. It will be available to be transcribed by all parties that would like a copy.

Before the court is the defendants' motion for summary judgment based upon the filed rate doctrine. After carefully considering the affidavits submitted by the parties, deposition

testimony filed with the court, and the extensive briefs that have been submitted, I conclude that the filed rate doctrine does apply to this case and bars any damage claim asserted by the plaintiffs, either individually or as a class. Summary judgment of dismissal, therefore, must be granted to the defendants.

First question: What is the filed rate doctrine?

The filed rate doctrine is a doctrine first enunciated by the U.S. Supreme Court in *Keogh v. Chicago and Northwestern Railroad Company*, 260 U.S. 156 (1922). It holds that no damages suit may be maintained against a regulated industry when the damages are based upon the hypothesis that the fixed rate or tariff established by a governmental agency was manipulated or controlled by the industry or members of it so that consumers or users paid too much for the goods or services after the price was set by the governmental rate or tariff. In other words, the Supreme Court held that courts cannot second-guess what an administrative agency would have done, had it been aware of the alleged conduct of the parties who are claimed to have manipulated or controlled the rate set by the agency.

The filed rate doctrine has its roots in the Supremacy and Commerce Clauses of the United States Constitution. It restrains a state's regulatory powers where Congress has assigned that function to a federal regulatory body. Citing *Arkansas Louisiana Gas Company v. Hall,* 453 U.S. 571, at 580-82 (1981.) The filed rate doctrine, therefore, prohibits private antitrust damage claims when those damage claims are measured by, or require, recalculation of a statutorily

regulated rate or tariff. It does not prohibit or foreclose governmental actions against the offending industry members or private suits for injunctive relief.

The filed rate doctrine is grounded in the principles of judicial deference to agency authority, avoidance of speculation as to what that agency might have done, and avoidance of discrimination or the creation of windfalls in damage awards that are based upon a recalculation of a statutorily mandated uniform rates. And for that principle, see *Wegoland Limited v. Nynex*, 27 F.3d 17, at page 19 (2d Circuit 1994). Two principles underscore the doctrine: First, a "filed rate" approved by a governing regulatory agency is "per se reasonable and unassailable," and that's citing *Wegoland* at 18; and second, courts are not "well suited to engage in retroactive rate setting." Again citing *Wegoland* at 19.

Wisconsin applied the filed rate doctrine in *Prentice v. Title Insurance Comnany of Minnesota*, 176 Wis.2d 714, (1993.) There, the plaintiffs alleged a conspiracy by title insurance companies to fix prices approved by the Wisconsin Commissioner of Insurance and the conspiracy caused the plaintiffs, a class of customers of the defendants during the period 1971 through 1984, to "pay substantially higher prices for title insurance and related services then they would have had to pay in the absence of the alleged conspiracy." That's citing *Prentice* at 720.

The court held that "even if the allegations are true, the filed rate doctrine shields the defendants from liability" for damages as a matter of law, because "the filed rate governs the relationship between the parties." Id. at 719 to 720.

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The parties to this action do not dispute the existence of the filed rate doctrine. Rather, the plaintiffs challenge its viability and breadth of application. The plaintiffs assert that the doctrine is "outdated" and only applies to "sum certain rates" where the regulated industry files a proposed rate or tariff with the governmental agency and the agency reviews the proposed rate and approves it for reasonableness. Once approved, that sum certain rate becomes binding on the industry and all industry members must uniformly charge that rate to the customers. Plaintiffs argue, therefore, that the filed rate doctrine only applies to common carriers and utilities who operate under "filed rates."

The defendants strongly disagree. They note the viability of the doctrine by pointing to recent examples of the application of the filed rate doctrine, including Wisconsin's application in *Prentice* in 1993. They note the breadth of the doctrine by citing examples of the application of the doctrine whenever a damage claim is based on a retroactive recalculation of a rate set by a governmental agency. They dispute the narrow limits placed on the doctrine by the plaintiffs and argue that the doctrine applies to rates set by the U.S. Department of Agriculture, among other agencies, which have nothing to do with common carriers and utilities. They cite, persuasively, the language from *Nantahala Power and Light Company v. Thornburg,* 476 U.S. 953, at page 966, (1986), where the court said "the filed rate doctrine is not limited to rates per se." In addition, they argue that the doctrine applies to any rate or price set by or approved by the governing regulatory agency, citing *Berning v. Gooding*, 820 F.2d 1550, (9th Circuit 1987).

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I agree with the defendants. In my opinion, the filed rate doctrine is alive, and given recent federal and state court decisions, it continues to be widely applied. And for that principle, I cite *Berning, Wegoland, North Carolina Steel, Inc. v. National Council on Group Insurance,* 496 S.E.2d 369, (1998) and Goldwasser v. Ameritech Corp., 1998 WL 60878 (Northern District of Illinois, February of 1998.)

Second question: Why does the filed rate doctrine apply to this case?

The plaintiffs allege that the defendants manipulated the price of bulk cheese on the National Cheese Exchange. They further allege that this manipulation of the price of cheese on the NCE directly impacted on the price that the plaintiffs, as well as all other dairy farmers, received for their milk. In other words, as I noted at the oral arguments, the liability theory of the plaintiffs' case is premised on the defendants' control of the price of bulk cheese on the NCE; the damages theory is premised on the price of milk that they, as producers, receive from the defendants as milk handlers. The nexus between these two components of the plaintiffs' case is the Federal Milk Marketing Order Program (FMMO), which sets the minimum price that milk handlers must pay milk producers.

The bulk cheese price on the NCE, known as the opinion price, is one factor, and the plaintiffs argue a significant factor, that goes into the U.S.D.A. formula for setting the minimum milk price that milk handlers must pay to milk producers on a monthly basis. This is also known as the blend price. The complicated formula I used to calculate the

blend price results in U.S.D.A. orders, called Federal Milk Marketing Orders, that apply to various milk producing regions around the country.

Plaintiffs argue that the link or connection between the NCE opinion price and the FMMO minimum price of milk permits the defendants to control or manipulate the blend price of milk to the detriment of the plaintiffs and other members of the class they seek to certify. Plaintiffs argue that "because the U.S.D.A. uses the NCE price in calculating the FMMO price floor for milk, plaintiffs receive less money for their milk than they would have, absent defendants' manipulations." (Quoting from plaintiff's brief at pages 19 to 20.)

Two factors cause the filed rate doctrine to be implicated in this case. First, the plaintiffs rely on this nexus between the NCE price for cheese and the milk blend price (plaintiffs do not argue that the defendants' alleged antitrust activity directly controlled the setting of the blend price, except insofar as their alleged activities controlled or manipulated the opinion price on the NCE and influenced that factor of the U.S.D.A. formula.) Second, the plaintiffs argue that their damages are measured by mathematical recalculation of the FMMO prices and would be based on what the minimum price for milk would have been, but for the defendants' alleged antitrust activity.

Question 3: Are minimum prices for milk set by the FMMO rates under the filed rate doctrine?

Under the authority of the Agricultural Marketing Agreement Act of 1937, as amended, milk marketing orders,

or FMMO's, are issued by the Secretary of Agriculture. The purpose of the FMMO program is to promote price uniformity and price stability in the milk market nationwide. This goal is accomplished by the U.S.D.A. fixing, or establishing a method for fixing, minimum prices for each class of milk used for different purposes. This is accomplished through a complicated formula determined following surveys of producers and handlers of milk and public hearings. The formula is then subject to the approval of the producers of milk. FMMO's are the result of statutory reasonableness standards. As noted in the Federal Milk Marketing Order Program Bulletin #27 put out by the U.S.D.A., the orders "grew out of the needs of milk producers for help in achieving and maintaining some degree of bargaining power over the prices they received for milk."

Although the FMMO program is a voluntary program, it is instituted at the request of dairy farmers and must be approved by them in a referendum. Any order may be terminated if 50 percent of the milk producers supplying more than 50 percent of the milk in that market request termination. The milk marketing program does not control production or restrict the marketing of milk by — producers; however, it is a legal instrument that promotes orderly marketing conditions under a "uniform system of classified pricing throughout the market." Id. at 5.

Section 608c(18) of the Agricultural Marketing Agreement Act requires that minimum pricing for milk producers in the various regions of the country be established to accomplish several goals; that the minimum prices reasonably reflect economic conditions affecting the supply and demand of milk

in that region; that the minimum prices assure a level of farm income adequate to maintain productive capacity; and that these prices are in the public interest. In short, the FMMO program is a comprehensive regulatory scheme that after public hearing and comment, and after approval from the milk producers, creates a formula that establishes minimum milk prices that are intended to reasonably reflect economic conditions affecting the supply and demand of milk. As the 8th Circuit noted in *Minnesota Milk Producers Association v. Glickman,* 153 F.3d 632, at page 642, (8th Circuit 1998), "A court's deference to administrative expertise raises to Zenith in connection with the intricate complex of regulation of milk marketing."

In sum, I find that the FMMO program satisfies the requirements of a "filed rate" for purposes of the filed rate doctrine. A "filed rate" is defined not by the act of "filing" a rate, but rather by the agency action taken with respect to the rate. "It is the approval of rates (by a governmental agency) that gives them the protection of the filed rate doctrine." Citing *North Carolina Steel, Inc.,* 496 S.E.2d 369, at 373, (1998). The FMMO program, in my opinion, is a comprehensive regulatory scheme based on a subjective and substantive reasonableness standard that satisfies the filed rate doctrine. "If a substantive, comprehensive regulatory scheme exists, the court has found that the private damages provisions of the antitrust laws are not an available remedy." From *City of Long Beach v. Standard Oil Company,* 872 F.2d 1401, at 1409 (9th Circuit 1989).

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Question number 4: What is the effect of the Filed Rate Doctrine?

The filed rate doctrine prohibits antitrust actions where the damages claim is based upon a recalculation of governmentally set rates. In this case, plaintiffs' expert witness admitted in his deposition that the damages phase of plaintiffs' case would involve such a recalculation. He stated in his deposition at page 105: "I think this infers that there could be a change in the class prices; and if there were, that would be a mathematical recalculation to arrive at the blend price." Plaintiffs argued in their brief to the same affect. At page 19, plaintiffs wrote as follows: "If the court holds, as plaintiffs request, that the NCE prices were manipulated by Kraft and the other defendants, the simple result will be a mathematical recalculation of the prices at which milk would have been sold during the class period."

The *Berning* case is on point. In that case, the U.S.D.A. and the Secretary of Agriculture regulated the production of hops under the Agriculture Adjustment Act. Plaintiffs sued the U.S.D.A. Hop Advisory Committee on the theory that the committee conspired to control the price and production of hops. The 9th Circuit threw out the case, noting that it is the Secretary of Agriculture who issues marketing orders, not the Advisory Committee. Therefore, the court held that "*Berning* has no available remedy for the conduct he alleges." Id. at 1552.

Similarly, in this case, the damages alleged by the plaintiffs is not an available remedy. Because the claim is premised on a retroactive increase of the FMMO minimum price of

milk during the period of the alleged antitrust conduct, the damages claim is barred by the filed rate doctrine. The damages claim becomes "purely speculative." Citing *Keogh* at page 164.

Question 5: What is the plaintiffs' Catch 22?

Plaintiffs' argument creates a Catch 22. On the one hand they argue that all dairy farmers' prices for milk were driven down by the defendants' manipulation of the NCE prices of cheese during the operative years, and therefore, there is an antitrust violation. On the other hand, in response to the defendants' assertion that the filed rate doctrine bars any damage claim, plaintiffs argue that 80 percent of the dairy farmers sell to cooperatives who are not covered by the FMMO program because they are *not* treated as milk handlers, and therefore, the filed rate doctrine is not applicable to this case.

In my opinion, plaintiffs cannot have it both ways. Either the alleged manipulation of the NCE cheese price drove down the FMMO minimum milk price and this manipulation affected all putative members of the class of dairy farmers; or the alleged manipulation of the NCE prices affected only 20 percent of the projected class, those dairy farmers selling directly to handlers who, presumably, could have also sold to cooperatives.

In addition, plaintiffs trip on their damage claim by arguing against the filed rate doctrine on the basis that most dairy farmers received more for their milk during the operative period than the minimum price set by the U.S.D.A.

If that was the case, it defeats the significance of the minimum price set by the U.S.D.A. if the open market drives a higher price. Where then, is the nexus between the price of cheese on the NCE and the price of milk on the market? In may opinion, plaintiffs have failed to reconcile their arguments into a consistent position.

Finally, in conclusion, summary judgment is available when there is nothing to try; that is to say, when there is no genuine issue of material fact in existence. This is especially true in antitrust cases. As the Seventh Circuit noted: "The very nature of antitrust litigation would encourage summary disposition of such cases when permissible." Citing *Lupia v. Stella D'Oro Biscuit Company,* 586 F.2d 1163, at 1167 (7th Circuit 1978.)

In this case, even if the plaintiffs prevail on the liability phase and convince a jury that Kraft and the other defendants manipulated sales on the NCE, and, as a result, manipulated the price of cheese; and conceding that the NCE price of cheese is a factor, even a substantial factor, in the formula setting the U.S.D.A. minimum price of milk, any damages flowing from that conduct is barred by the filed rate doctrine.

Therefore, summary judgment is awarded to the defendants dismissing the plaintiffs' claims and granting a judgment of dismissal. And I would ask counsel on behalf of Kraft to prepare a written judgment for my signature.

* * * *

APPENDIX D — STATUTORY PROVISIONS INVOLVED

7 U.S.C.S. § 608c (2002)

§ 608c. Orders regulating handling of commodity

(1) Issuance by Secretary. The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this title as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. In carrying out this section, the Secretary shall complete all informal rulemaking actions necessary to respond to recommendations submitted by administrative committees for such orders as expeditiously as possible, but not more than 45 days (to the extent practicable) after submission of the committee recommendations. The Secretary is authorized to implement a producer allotment program and a handler withholding program under the cranberry marketing order in the same crop year through informal rulemaking based on a recommendation and supporting economic analysis submitted by the Cranberry Marketing Committee. Such recommendation and analysis shall be submitted by the Committee no later than March 1 of each year.

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The Secretary shall establish time frames for each office and agency within the Department of Agriculture to consider the committee recommendations.

(2) Commodities to which applicable; single commodities and separate agricultural commodites. Orders issued pursuant to this section shall be applicable only to (A) the following agricultural commodities and the products thereof (except canned or frozen pears, grapefruit, cherries, apples, or cranberries, the products of naval stores, and the products of honeybees), or to any regional, or market classification of any such commodity or product: Milk, fruits (including filberts, almonds, pecans and walnuts but not including apples, other than apples produced in the States of Washington, Oregon, Idaho, New York, Michigan, Maryland, New Jersey, Indiana, California, Maine, Vermont, New Hampshire, Rhode Island, Massachusetts, Connecticut, Colorado, Utah, New Mexico, Illinois, and Ohio, and not including fruits for canning or freezing other than pears, olives, grapefruit, cherries, caneberries (including raspberries, blackberries, and loganberries), cranberries, and apples produced in the States named above except Washington, Oregon, and Idaho), tobacco, vegetables (not including vegetables, other than asparagus, for canning or freezing and not including potatoes for canning, freezing, or other processing), hops, honeybees and naval stores as included in the Naval Stores Act [7 USCS §§ 91 et seq.] and standards established thereunder (including refined or partially refined oleoresin): Provided, That no order issued pursuant to this section shall be effective as to any grapefruit for canning or freezing unless the

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Secretary of Agriculture determines, in addition to other findings and determinations required by this Act, that the issuance of such order is approved or favored by the processors who, during a representative period determined by the Secretary, have been engaged in canning or freezing such commodity for market and have canned or frozen for market more than 50 per centum of the total volume of such commodity canned or frozen for market during such representative period; and (B) any agricultural commodity (except honey, cotton, rice, wheat, corn, grain sorghums, oats, barley, rye, sugarcane, sugarbeets, wool, mohair, livestock, soybeans, cottonseed, flaxseed, poultry (but not excepting turkeys and not excepting poultry which produce commercial eggs), fruits and vegetables for canning or freezing, including potatoes for canning, freezing, or other processing, and apples), or any regional or market classification thereof, not subject to orders under (A) of this paragraph, but not the products (including canned or frozen commodities or products) thereof. No order issued pursuant to this section shall be effective as to cherries, apples, or cranberries for canning or freezing unless the Secretary of Agriculture determines, in addition to other required findings and determinations, that the issuance of such order is approved or favored by processors who, during a representative period determined by the Secretary, have engaged in canning or freezing such commodity for market and have frozen or canned more than 50 per centum of the total volume of the commodity to be regulated which was canned or frozen within the production area, or marketed within the marketing area,

defined in such order, during such representative period. No order issued pursuant to this section shall be applicable to peanuts produced in more than one of the following production areas: the Virginia-Carolina production area, the Southeast production area, and the Southwest production area. If the Secretary determines that the declared policy of the title will be better achieved thereby (i) the commodities of the same general class and used wholly or in part for the same purposes may be combined and treated as a single commodity and (ii) the portion of an agricultural commodity devoted to or marketed for a particular use or combination of uses, may be treated as a separate agricultural commodity. All agricultural commodities and products covered hereby shall be deemed specified herein for the purposes of section 8c(6) and (7) of this title [subsecs. (6), (7) of this section].

(3) Notice and hearing. Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this title with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

(4) Finding and issuance of order. After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order

and all of the terms and conditions thereof will tend to effectuate the declared policy of this title with respect to such commodity.

(5) Milk and its products; terms and conditions of orders. In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers. Throughout the 2-year period beginning on the effective date of this sentence (and subsequent to such 2-year period unless modified by amendment to the order involved), the minimum aggregate amount of the adjustments, under clauses (1) and (2) of the preceding sentence, to prices for milk of the highest use classification under orders that are in

effect under this section on the date of the enactment of the Food Security Act of 1985 [enacted Dec. 23, 1985] shall be as follows:

Marketing Area Subject to Order	Minimum Aggregate Dollar Amount of Such Adjustments Per Hundredweight of Milk Having 3.5 Percent Milkfat
New England	$ 3.24
New York-New Jersey	3.14
Middle Atlantic	3.03
Georgia	3.08
Alabama-West Florida	3.08
Upper Florida	3.58
Tampa Bay	3.88
Southeastern Florida	4.18
Michigan Upper Peninsula	1.35
Southern Michigan	1.75
Eastern Ohio-Western Pennsylvania	1.95
Ohio Valley	2.04
Indiana	2.00
Chicago Regional	1.40
Central Illinois	1.61
Southern Illinois	1.92
Louisville-Lexington-Evansville	2.11
Upper Midwest	1.20
Eastern South Dakota	1.50
Black Hills, South Dakota	2.05
Iowa	1.55
Nebraska-Western Iowa	1.75
Greater Kansas City	1.92

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Tennessee Valley	2.77
Nashville, Tennessee	2.52
Paducah, Kentucky	2.39
Memphis, Tennessee	2.77
Central Arkansas	2.77
Fort Smith, Arkansas	2.77
Southwest Plains	2.77
Texas Panhandle	2.49
Lubbock-Plainview, Texas	2.49
Texas	3.28
Greater Louisiana	3.28
New Orleans-Mississippi	3.85
Eastern Colorado	2.73
Western Colorado	2.00
Southwestern Idaho-Eastern Oregon	1.50
Great Basin	1.90
Lake Mead	1.60
Central Arizona	2.52
Rio Grande Valley	2.35
Puget Sound-Inland	1.85
Oregon-Washington	1.95

Effective at the beginning of such two-year period, the minimum prices for milk of the highest use classification shall be adjusted for the locations at which delivery of such milk is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices

for all milk delivered by them: Provided, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, (d) a further adjustment to encourage seasonal adjustments in the production of milk through equitable apportionment of the

total value of the milk purchased by any handler, or by all handlers, among producers on the basis of their marketings of milk during a representative period of time, which need not be limited to one year; (e) a provision providing for the accumulation and disbursement of a fund to encourage seasonal adjustments in the production of milk may be included in an order; and (f) a further adjustment, equitably to apportion the total value of milk purchased by all handlers among producers on the basis of their marketings of milk, which may be adjusted to reflect the utilization of producer milk by all handlers in any use classification or classifications, during a representative period of one to three years, which will be automatically updated each year. In the event a producer holding a base allocated under this clause (f) shall reduce his marketings, such reduction shall not adversely affect his history of production and marketing for the determination of future bases, or future updating of bases, except that an order may provide that, if a producer reduces his marketings below his base allocation in any one or more use classifications designated in the order, the amount of any such reduction shall be taken into account in determining future bases, or future updating of bases. Bases allocated to producers under this clause (f) may be transferable under an order on such terms and conditions, including those which will prevent bases taking on an unreasonable value, as are prescribed in the order by the

Secretary of Agriculture. Provisions shall be made in the order for the allocation of bases under this clause (f)

(i) for the alleviation of hardship and inequity among producers; and

(ii) for providing bases for dairy farmers not delivering milk as producers under the order upon becoming producers under the order who did not produce milk during any part of the representative period and these new producers shall within ninety days after the first regular delivery of milk at the price for the lowest use classification specified in such order be allocated a base which the Secretary determines proper after considering supply and demand conditions, the development of orderly and efficient marketing conditions and to the respective interests of producers under the order, all other dairy farmers and the consuming public. Producer bases so allocated shall for a period of not more than three years be reduced by not more than 20 per centum; and

(iii) dairy farmers not delivering milk as producers under the order upon becoming producers under the order by reason of a plant to which they are making deliveries becoming a pool plant under the order, by amendment or otherwise, shall be provided bases with respect to milk delivered under the order based on their past deliveries of milk on the some basis as other producers under the order; and

(iv) such order may include such additional provisions as the Secretary deems appropriate in regard to the reentry of producers who have previously discontinued their dairy farm enterprise or transferred bases authorized under this clause (f); and

(v) notwithstanding any other provision of this Act, dairy farmers not delivering milk as producers under the order, upon becoming producers under the order, shall within ninety days be provided with respect to milk delivered under the order, allocations based on their past deliveries of milk during the representative period from the production facilities from which they are delivering milk under the order on the same basis as producers under the order on the effective date of order provisions authorized under this clause (f): Provided, That bases shall be allocated only to a producer marketing milk from the production facilities from which he marketed milk during the representative period, except that in no event shall such allocation of base exceed the amount of milk actually delivered under such order.

The assignment of other source milk to various use classes shall be made without regard to whether an order contains provisions authorized under this clause (f). In the case of any producer who during any accounting period delivers a portion of his milk to persons not fully regulated by the order, provision shall be made for reducing the allocation of, or payment to be received

by, any such producer under this clause (f) to compensate for any marketings of milk to such other persons for such period or periods as necessary to insure equitable participation in marketings among all producers. Notwithstanding the provisions of section 8c(12) and the last sentence of section 8c(19) of this Act, order provisions under this clause (f) shall not be effective in any marketing order unless separately approved by producers in a referendum in which each individual producer shall have one vote and may be terminated separately whenever the Secretary makes a determination with respect to such provisions as is provided for the termination of an order in subparagraph 8c(16)(B). Disapproval or termination of such order provisions shall not be considered disapproval of the order or of other terms of the order.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection (5), providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) hereof.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby,

payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection (5).

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection (5), for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection (5) is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of the Act of Congress of February 18, 1922, as amended, known as the "Capper-Volstead Act" [7 USCS §§ 291, 292], engaged in making collective sales or marketing of milk or its products for the producers thereof; from blending the net proceeds of all of its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers:

Provided, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection (5) for such milk.

* * *

(L) Providing that adjustments in payments by handlers under paragraph (A) need not be the same as adjustments to producers under paragraph (B) with regard to adjustments authorized by subparagraphs (2) and (3) of paragraph (A) and clauses (b), (c), and (d) of paragraph (B)(ii).

(6) Other commodities; terms and conditions of orders. In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)), no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size, or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign

commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

(B) Allotting, or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts sold by such producers in such prior period as the Secretary determines to be representative, or upon the current quantities available for sale by such producers, or both, to the end that the total quantity thereof to be purchased, or handled during any specified period or periods shall be apportioned equitably among producers.

(C) Allotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed

in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods shall be equitably apportioned among all of the handlers thereof.

(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

(E) Establishing or providing for the establishment of reserve pools of any such commodity or product, or of any grade, size, or quality thereof, and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

(F) Requiring or providing for the requirement of inspection of any such commodity or product produced during specified periods and marketed by handlers.

(G) In the case of hops and their products, in addition to, or in lieu of, the foregoing terms and conditions, orders may contain one or more of the following:

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(i) Limiting, or providing methods for the limitation of, the total quantity thereof, or of any grade, type, or variety thereof, produced during any specified period or periods, which all handlers may handle in the current of or so as directly to burden, obstruct, or affect interstate or foreign commerce in hops or any product thereof.

(ii) Apportioning, or providing methods for apportioning, the total quantity of hops of the production of the then current calendar year permitted to be handled equitably among all producers in the production area to which the order applies upon the basis of one or more or a combination of the following: The total quantity of hops available or estimated will become available for market by each producer from his production during such period; the normal production of the acreage of hops operated by each producer during such period upon the basis of the number of acres of hops in production, and the average yield of that acreage during such period as the Secretary determines to be representative, with adjustments determined by the Secretary to be proper for age of plantings or abnormal conditions affecting yield; such normal production or historical record of any

acreage for which data as to yield of hops are not available or which had no yield during such period shall be determined by the Secretary on the basis of the yields of other acreage of hops of similar characteristics as to productivity, subject to adjustment as just provided for.

(iii) Allotting, or providing methods for allotting, the quantity of hops which any handler may handle so that the allotment fixed for that handler shall be limited to the quantity of hops apportioned under preceding section (ii) to each respective producer of hops; such allotment shall constitute an allotment fixed for that handler within the meaning of subsection (5) of section 8a of this title (U.S.C., 1940 edition, title 7, sec. 608a) [7 USCS § 608a(5)].

(H) Providing a method for fixing the size, capacity, weight, dimensions, or pack of the container, or containers, which may be used in the packaging, transportation, sale, shipment, or handling of any fresh or dried fruits, vegetables, or tree nuts: Provided, however, That no action taken hereunder shall conflict with the Standard Containers Act of 1916 (15 U.S.C. 251-256) and the Standard Containers Act of 1928 (15 U.S.C. 257-257i):[.]

* * *

(J) In the case of pears for canning or freezing, any order for a production area encompassing territory within two or more States or portions thereof shall provide that the grade, size, quality, maturity, and inspection regulation under the order applicable to pears grown within any such State or portion thereof may be recommended to the Secretary by the agency established to administer the order only if a majority of the representatives from the State on such agency concur in the recommendation each year.

(7) Terms common to all orders. In the case of the agricultural commodities and the products thereof specified in subsection (2) orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection,

of an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph (C) shall be deemed to be acting in an official capacity, within the meaning of section 10(g) of this title [7 USCS § 610(g)], unless such person receives compensation for his personal services from funds of the United States. There shall be included in the membership of any agency selected to administer a marketing order applicable to grapefruit or pears for canning or freezing one or more representatives of processors of the commodity specified in such order: Provided, That in a marketing order applicable to pears for canning or freezing the representation of processors and producers on such agency shall be equal.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) and necessary to effectuate the other provisions of such order.

(8) Orders with marketing agreement. Except as provided in subsection (9) of this section, no order issued pursuant to this section shall become effective until the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of not less than 50 per centum of the volume of the commodity or product thereof covered by such order which is produced or marketed within the production or marketing area defined in such order have signed a marketing agreement, entered into pursuant to section 8b of this title [7 USCS § 608b], which regulates the handling of such commodity or product in the same manner as such order, except that as to citrus fruits produced in any area producing what is known as California citrus fruits no order issued pursuant to this subsection (8) shall become effective until the handlers of not less than 80 per centum of the volume of such commodity or product thereof covered by such order have signed such a marketing agreement: Provided, That no order issued pursuant to this subsection shall be effective unless the Secretary of Agriculture determines that the issuance of such order is approved or favored:

(A) By at least two-thirds of the producers who (except that as to citrus fruits produced in

any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers), during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(B) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

(9) Orders with or without marketing agreement. Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced

in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture [with the approval of the President,] determines:

(A) That the refusal or failure to sign a marketing agreement (upon which a hearing has been held) by the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) specified therein which is produced or marketed within the production or marketing area specified therein tends to prevent the effectuation of the declared policy of this title with respect to such commodity or product, and

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits

produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers) who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

* * *

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(11) Regional application.

(A) No order shall be issued under this section which is applicable to all production areas or marketing areas, or both, of any commodity or product thereof unless the Secretary finds that the issuance of several orders applicable to the respective regional production areas or regional marketing areas, or both, as the case may be, of the commodity or product would not effectively carry out the declared policy of this title.

(B) Except in the case of milk and its products, orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy.

(C) All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas.

The price of milk paid by a handler at a plant operating in Clark County, Nevada shall not be subject to any order issued under this section.

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(12) Approval of cooperative association as approval of producers. Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the producers who are members of, stockholders in, or under contract with, such cooperative association of producers.

(14) Violation of order; penalty.

(A) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order shall, on conviction, be fined not less than $ 50 or more than $ 5000 for each such violation, and each day during which such violation continues shall be deemed a separate violation. If the court finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's

ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15).

(B) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order may be assessed a civil penalty by the Secretary not exceeding $ 1,000 for each such violation. Each day during which such violation continues shall be deemed a separate violation, except that if the Secretary finds that a petition pursuant to paragraph (15) was filed and prosecuted by the handler in good faith and not for delay, no civil penalty may be assessed under this paragraph for such violations as occurred between the date on which the handler's petition was filed with the Secretary, and the date on which notice of the Secretary's ruling thereon was given to the handler in accordance with regulations prescribed pursuant to paragraph (15). The Secretary may issue an order assessing a civil penalty under this paragraph only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable in the district courts of the United States in any district in which the handler subject to the order is an inhabitant, or has the handler's principal place of business. The validity of such order may not be reviewed in an action to collect such civil penalty.

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(15) Petition by handler for modification of order; court review of ruling of Secretary.

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States (including the Supreme Court of the District of Columbia [District Court of the United States for the District of Columbia]) in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as

the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 8a(6) of this title [7 USCS § 608a(6)]. Any proceedings brought pursuant to section 8a(6) of this title [7 USCS § 608a(6)] (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

(16) Termination of orders and marketing agreements.

(A) (i) Except as provided in clause (ii), the Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this title, terminate or suspend the operation of such order or such provision thereof.

(ii) The Secretary may not terminate any order issued under this section for a commodity for which there is no Federal program established to support the price of such commodity unless the Secretary gives notice of, and a statement of the

reasons relied upon by the Secretary for, the proposed termination of such order to the Committee on Agriculture, Nutrition, and Forestry of the Senate and the Committee on Agriculture of the House of Representatives not later than 60 days before the date such order will be terminated.

(B) The Secretary shall terminate any marketing agreement entered into under section 8b [7 USCS § 608b], or order issued under this section, at the end of the then current marketing period for such commodity, specified in such marketing agreement or order, whenever he finds that such termination is favored by a majority of the producers who, during a representative period determined by the Secretary, have been engaged in the production for market of the commodity specified in such marketing agreement or order, within the production area specified in such marketing agreement or order, or who, during such representative period, have been engaged in the production of such commodity for sale within the marketing area specified in such marketing agreement or order: Provided, That such majority have, during such representative period, produced for market more than 50 per centum of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or have, during such representative period, produced more than 50 per centum of the volume of such commodity sold in the marketing area specified in such marketing

agreement or order, but such termination shall be effective only if announced on or before such date (prior to the end of the then current marketing period) as may be specified in such marketing agreement or order.

(C) Except as otherwise provided in this subsection with respect to the termination of an order issued under this section, the termination or suspension of any order or amendment thereto or provision thereof, shall not be considered an order within the meaning of this section.

(17) Provisions applicable to amendments. The provisions of this section, [and] section 8d [7 USCS § 608d] applicable to orders shall be applicable to amendments to orders: Provided, That notice of a hearing upon a proposed amendment to any order issued pursuant to section 8c [this section], given not less than three days prior to the date fixed for such hearing, shall be deemed due notice thereof.

(18) Milk prices. The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain the parity prices of such commodities. The prices which it is declared to be the policy of Congress to establish in section 2 of this title [7 USCS § 602] shall, for the purposes of such agreement, order, or amend-

ment, be adjusted to reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk or its products in the marketing area which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 8b or 8c [7 USCS § 608b or this section], as the case may be, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.

(19) Producer or processor referendum for approving order. For the purpose of ascertaining whether the issuance of an order is approved or favored by producers or processors, as required under the applicable provisions of this title, the Secretary may conduct a referendum among producers or processors and in the case of an order other than an amendatory order shall do so. The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of producers or processors, or the

total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provision. The terms and conditions of the proposed order shall be described by the Secretary in the ballot used in the conduct of the referendum. The nature, content, or extent of such description shall not be a basis for attacking the legality of the order or any action relating thereto. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12) of this section. For the purpose of ascertaining whether the issuance of an order applicable to pears for canning or freezing is approved or favored by producers as required under the applicable provisions of this title, the Secretary shall conduct a referendum among producers in each State in which pears for canning or freezing are proposed to be included within the provisions of such marketing order and the requirements of approval or favor under any such provisions applicable to pears for canning or freezing shall be held to be complied with if, of the total number of producers, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of 66 2/3 per centum except that in the event that pear producers in any State fail to approve or favor the issuance of any such marketing order, it shall not be made effective in such State.

(2)

Supreme Court, U.S.
FILED
OCT 31 2002
OFFICE OF THE CLERK

No. 02-509

IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

JAMES SERVAIS; DOUGLAS PIERCE; WILLIAM R. DOBSON; ROGER NOLL; RITA NOLL; BYRON KRUEGER; MELVIN SCHMITZ; ROGER SWANSON,

Petitioners,

v.

KRAFT FOODS NORTH AMERICA, INC.; BORDEN CHEMICAL, INC.; LAND O'LAKES, INC.; NATIONAL CHEESE EXCHANGE, INC.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Wisconsin

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STATEMENT PURSUANT TO RULE 29.6

Respondent Kraft Foods North America, Inc. (f/k/a Kraft Foods, Inc., and identified as such in the caption below), is wholly owned by Kraft Foods Inc., which is a publicly held company. Philip Morris Companies, Inc., a publicly held company, owns more than 10% of its stock.

Respondent Borden Chemical, Inc. (f/k/a Borden, Inc., and identified as such in the caption below), is a privately held company. It is majority-owned by Borden Holdings, Inc., which is also a privately held company.

Respondent Land O'Lakes, Inc. (successor in interest to Alpine Lace Brands, Inc., identified as such in the caption below), has no parent corporation, and no publicly held company owns more than 10% of its stock.

Respondent National Cheese Exchange, Inc., is a non-stock, non-profit corporation. It has no parent corporation, and no publicly held company owns more than 10% of its stock.

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INTRODUCTION

Petitioners seek review of the Wisconsin Supreme Court's order summarily affirming the Wisconsin Court of Appeals' unanimous decision applying the filed rate doctrine to foreclose petitioners' claims. As a threshold matter, *certiorari* is inappropriate in this case because the Wisconsin Supreme Court's order gives no indication that the court adopted the *Wisconsin Court of Appeals'* reasoning, which petitioners are now challenging. Indeed, petitioners' primary argument before the Wisconsin Supreme Court was that the filed rate doctrine should not apply in this case *as a matter of state law, not federal law*. Even assuming that the Wisconsin Supreme Court adopted wholesale the reasoning of the Wisconsin Court of Appeals, however, nothing in that court's unremarkable application of the filed rate doctrine merits this Court's review. *Certiorari* should be denied.

COUNTERSTATEMENT OF THE CASE

This case involves the federal milk marketing system, a complex regulatory scheme established by the Agricultural Marketing Agreement Act of 1937 and administered by the United States Department of Agriculture (USDA) to promote orderly market conditions for the sale and supply of milk. *See* Pet. 8a.[1] The object of the federal milk marketing system is to fix minimum prices to be paid to milk producers by handlers and to ensure adequate milk supplies. *See id.* These milk marketing orders apply regionally. *See id.* Once a new milk marketing order is proposed, the USDA begins a rulemaking process in order to decide whether a milk marketing order is warranted at all, and, if so, whether the proposed order is appropriate. *See id.* at 9a. Before any order takes effect, it must receive approval from the dairy farmers in the

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[1] On August 7, 2001, the Wisconsin Court of Appeals issued an amended version of its opinion. Petitioners have attached the prior, superseded version of the court's opinion to their petition. Because none of the amendments affected portions of the opinion we cite in our brief, we, like petitioners, cite the superseded opinion. The amended version of the court's opinion can be found at 631 N.W.2d 629.

relevant region. *See id.* at 10a. A similar process exists to amend existing milk marketing orders. *See id.*

Petitioners are dairy farmers who claim to have been adversely affected by federal milk marketing orders establishing the minimum price in the regions in which they produce milk. *See id.* at 5a. They allege that three *cheese* producers—Kraft Foods, Inc. (now known as Kraft Foods North America, Inc.); Borden, Inc. (now known as respondent Borden Chemical, Inc.); and Alpine Lace Brands, Inc. (succeeded by respondent Land O'Lakes, Inc.)—manipulated the "minimum pay prices" contained in the applicable federal milk marketing orders by engaging in certain transactions on the National Cheese Exchange, an open market operated by respondent National Cheese Exchange, Inc. *See id.* at 5a-6a. Petitioners claim that respondents were able to manipulate the "minimum pay prices" contained in the federal milk marketing orders because the USDA based those prices, in part, on the price of cheese, which in turn was based, in part, on the reported price of cheese on the National Cheese Exchange. *See id.* at 9.

Petitioners brought suit against respondents under state (but not federal) antitrust law, seeking damages for the lower amount paid to them by handlers and co-ops as a result of the allegedly lower prices contained in the federal milk marketing orders. *See id.* at 5a-6a. After petitioners had a full opportunity for discovery, respondents moved for summary judgment in the trial court on the ground that petitioners' claims were foreclosed by the filed rate doctrine, which precludes suits for damages that are based on challenges to lawfully established rates. *See id.* at 6a-7a. The trial court granted respondents' motion for summary judgment. *See id.* at 6a.

The Wisconsin Court of Appeals unanimously affirmed. *See id.* at 3a-14a. The court reasoned that, "[t]o calculate the damages Servais claims to have sustained under these antitrust claims, * * *

a court would have to conclude that the USDA minimum pay price is not reasonable and to speculate what price the USDA would have set for milk orders if the alleged price manipulation at the National Cheese Exchange had not occurred." *Id.* at 12a. The court added that "such speculation would undermine a congressional scheme of uniform rate regulation and award as damages a dollar amount based on a new milk price never established by the USDA," *id.*, which, in turn, would require "substituting the judgment of a court as to what constitutes a reasonable minimum pay price for the judgment of the USDA," *id.* at 12a-13a.

The Wisconsin Supreme Court affirmed by an evenly divided court in a summary order. *See id.* at 1a-2a.

REASONS FOR DENYING THE WRIT

I. THE QUESTIONS PRESENTED BY THE PETITION ARE NOT PROPERLY BEFORE THIS COURT.

The sum total of the Wisconsin Supreme Court's reasoning in its summary order is a statement that "[t]he court is equally divided on the question of whether the decision of the court of appeals should be affirmed or reversed." Pet. 2a. Because the justices of the Wisconsin Supreme Court gave no indication of the reasoning for their votes to affirm, and because the Wisconsin Supreme Court may affirm a lower court on any ground supported by the record, *see, e.g.*, *Mueller v. Mizia*, 147 N.W.2d 269, 273 (Wis. 1967), it is simply impossible to say here whether the Wisconsin Supreme Court "has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals," S. Ct. R. 10(b), or whether it "has decided an important federal question in a way that conflicts with relevant decisions of this Court," S. Ct. R. 10(c).

In apparent recognition of this vehicle problem, petitioners claim that "[a]ffirmance by an equally divided court in the opinion as to which petitioners seek a writ of certiorari is no bar to granting the

writ." Pet. 2 n.2. The cases that petitioners cite, however, are both inapposite. In *Conroy v. Aniskoff*, 507 U.S. 511 (1993), this Court considered whether members of the armed services must show that their military service prejudiced their ability to redeem title to property in order to qualify for a suspension of time to redeem under the Soldiers' and Sailors' Civil Relief Act. Although the Maine Supreme Judicial Court did affirm the decision below by an equally divided court, it expressly made clear in its order that it was equally divided *on the federal question that was presented to this Court*. *See Conroy v. Town of Danforth*, 599 A.2d 426, 427 (Me. 1991).

In *Hill v. Lockhart*, 474 U.S. 52 (1985), the Court considered whether the test of *Strickland v. Washington*, 466 U.S. 668 (1984), applied to guilty-plea challenges based on ineffective assistance of counsel. In that case, the Court was reviewing an order of the *en banc* Eighth Circuit affirming the district court's decision by an equally divided court. The panel opinion, however, made clear that the ineffective-assistance issue ultimately decided by this Court was cleanly before the Eighth Circuit, and the affirmance by the equally divided *en banc* court therefore necessarily constituted a ruling on that issue. *See Hill v. Lockhart*, 731 F.2d 568 (8th Cir. 1984).

The vehicle problem presented by the Wisconsin Supreme Court's summary order is only exacerbated by the fact that petitioners' primary argument before the Wisconsin Supreme Court was that the filed rate doctrine should not apply in this case *as a matter of state law, not federal law*. *See* Wis. S. Ct. Br. for Petrs. 14 ("I. The Applicability of the Filed Rate Doctrine Is Controlled by Wisconsin Law Not Federal Law."). It is therefore entirely possible that the justices of the Wisconsin Supreme Court who voted to affirm accepted petitioners' now-abandoned argument that the applicability of the filed rate doctrine was a matter of *state* law, but nevertheless affirmed on the alternative ground that the filed rate doctrine *did apply* as a matter of state law. If so, the

unstated reasoning of the Wisconsin Supreme Court would stand as an adequate and independent state ground barring this Court's review. *See Michigan v. Long*, 463 U.S. 1032, 1041 (1983).

For these reasons, petitioners' constant references to the "Wisconsin Decision"—that is, the decision of the Wisconsin Court of Appeals—and their constant requests that this Court overrule that "Decision" are ultimately irrelevant. The only decision before this Court on *certiorari*, of course, is the summary order of the Wisconsin Supreme Court. To the extent the Wisconsin Court of Appeals' decision implicates certworthy issues, this Court should await a case in which those issues are clearly before it.

II. THE LOWER COURT CORRECTLY APPLIED SETTLED LAW.

In any event, the decision of the Wisconsin Court of Appeals constitutes an unremarkable application of the filed rate doctrine and involves no certworthy issues. We address each of petitioners' questions presented in turn.

A. Petitioners first contend that the Wisconsin Court of Appeals erred by "assum[ing]," *see* Pet. 14, or "hold[ing]," *see id.* at 16, that the USDA's milk marketing order system preempts the field of milk marketing regulation, in conflict with this Court's decision in *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), and numerous lower-court decisions. *See* Pet. 16-20.

In its opinion, however, the Court of Appeals did no such thing. To the contrary, it expressly recognized that "[m]ilk marketing orders can also be established through state milk marketing systems," *id.* at 8a n.3, and concluded, citing *Florida Lime*, that "the federal government has *not* preempted the field for establishing milk orders," *id.* (emphasis added).

Notwithstanding this crystal-clear language, petitioners doggedly contend that the Wisconsin Court of Appeals must be presumed to

have concluded that there was field preemption because it "used classic field preemption language and analysis." *Id.* at 14. Again, however, petitioners mischaracterize the Court of Appeals' opinion. Although the court did refer to "a congressional scheme of uniform rate regulation," *id.* at 12a, it did not in any way suggest that the federal milk marketing orders in question set uniform rates *for the entire country*; instead, it implied only that the federal milk marketing orders set uniform rates *for the regions covered by the orders*, and did not foreclose the possibility that States could impose their own milk marketing orders. Petitioners' attempt to rewrite the Court of Appeals' opinion in order to manufacture a split should be rejected.

B. Petitioners next assert that the Wisconsin Court of Appeals erred by applying the federal filed rate doctrine in the absence of field preemption. *See* Pet. 20-25.

It is true that, as applied to state-law claims bearing on federal rates, the source of constitutional authority for the filed rate doctrine (as for federal preemption more generally) is the Supremacy Clause. *See, e.g., Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 963 (1986); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 582 (1981). From that modest premise, however, it does not follow that field preemption is a prerequisite for application of the filed rate doctrine. The filed rate doctrine operates only to prevent state-law challenges to the *reasonableness* of federally established rates. *See Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251-52 (1951). It does not prevent States categorically from engaging in regulation of their own—provided, of course, that the regulation is not inconsistent with the federal regulatory scheme. Thus, in this case, the mere fact that States may be able to set their own minimum rates in some circumstances does not imply that States can authorize litigation that would effectively challenge the validity of federal rate *determinations*.

Moreover, if field preemption were a prerequisite for application of the filed rate doctrine, it would be impossible to square such a conclusion with those cases in which this Court has applied the filed rate doctrine to foreclose *federal* claims, where "preemption" by definition could not have occurred. *See, e.g., Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 417-23 (1986); *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156, 163-64 (1922).

It is unsurprising, therefore, that none of the four cases on which petitioners primarily rely stands for the proposition that field preemption is required in order to apply the filed rate doctrine. In *Nantahala Power*, this Court held that a state utility commission order allocating entitlement power in a manner inconsistent with that ordered by the Federal Energy Regulatory Commission was barred by the filed rate doctrine. *See* 476 U.S. at 967-73. In *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354 (1988), the Court held that a state utility commission could not, consistent with the filed rate doctrine, conduct proceedings to determine whether FERC-mandated payments for costs were "reasonably incurred operating expenses" for purposes of setting the utility's retail rates, *see id.* at 369-77. In *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), the Court did not address the filed rate doctrine at all, but instead merely held that a state-law action by a shipper injured by a common carrier's failure to provide adequate rail service was preempted by a federal agency's approval of the common carrier's decision to abandon service, *see id.* at 324-31. Finally, in *Arkansas Louisiana Gas*, the Court applied the filed rate doctrine to preclude a state action for damages resulting from the difference between a contract rate approved by a federal agency and a higher rate that plaintiffs alleged would have been approved by the agency if they had been informed of the relevant factual circumstances. *See* 453 U.S. at 576-84. None of these cases so much as refers to "field

preemption," much less engrafts a field-preemption requirement onto the filed rate doctrine.

C. Finally, petitioners assert that the Wisconsin Court of Appeals' decision is somehow inconsistent with USDA policy. *See* Pet. 25-27.

By their own admission, petitioners' argument boils down to an assertion that the "minimum prices [set by the USDA] do not result from the kind of regulatory discretion and subjective judgments of reasonableness that could form the basis for an application of the federal filed rate doctrine." *Id.* at 26. Whether or not the USDA exercises "regulatory discretion and subjective judgments of reasonableness" in setting minimum milk prices, petitioners allege no split of authority with regard to whether the filed rate doctrine is applicable in the context of federal milk marketing regulation, and petitioners have adduced no evidence to suggest that the USDA has ever disclaimed the applicability of the filed rate doctrine to their milk marketing orders. Moreover, to the extent that petitioners insinuate that the Wisconsin Court of Appeals' decision is inconsistent with federal policy more generally, both the Federal Trade Commission and the Commodity Futures Trading Commission have already investigated petitioners' claims and determined that there is no basis for further inquiry. *See* Wis. S. Ct. Resp. App. 154-56, 191-93. Petitioners' argument is therefore meritless.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of *certiorari*.

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 14 2002
CLERK

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IN THE

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JAMES SERVAIS, *et al.*,

Petitioners,

v.

KRAFT FOODS, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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Robert L. Stern, Eugene Gressman, Stephen M. Shapiro and Kenneth S. Geller *Supreme Court Practice* (8th ed. 2002) 2

INTRODUCTION

Petitioners have presented a State court decision that directly contradicts a decision of this Court and creates a split of authority with various federal cases and with the policy of the USDA. As respondents fear a summary reversal, they attempt to fool the Court into believing there is a fatal vehicle problem with this case — an adequate and independent state ground — when no such problem does or could exist.

The Wisconsin Decision[1] directly conflicts with a decision of this Court, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), and creates a split of authority due to its conflicts with federal appellate decisions and federal district court decisions, including two that have been summarily affirmed by this Court. *See* Pet. at 16-20. Equally important, the Wisconsin Decision is injurious to every dairy farmer in the Nation, violative of USDA policy, and is a question of utmost "importance . . . for the agricultural community and for the administration of the antitrust laws." *National Broker Marketing Association v. United States*, 436 U.S. 816, 820 (1978).

Accordingly, the Court should grant the Petition for Writ of Certiorari and consider summary reversal. The Court may also want to consider calling for the views of the USDA through the Solicitor General.

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1. Defined terms herein have the same meaning as in the Petition.

I.

THE FEDERAL QUESTIONS PRESENTED ARE PROPERLY BEFORE THE COURT

Respondents do not contest that the judgment by an equally-divided panel of the Wisconsin Supreme Court affirming the Wisconsin Court of Appeals (the "Wisconsin Decision") is reviewable under § 1257(a) or *Tumey v. Ohio*, 273 U.S. 510, 515 (1927); *see* Robert L. Stern, Eugene Gressman, Stephen M. Shapiro and Kenneth S. Geller, *Supreme Court Practice* 167 (8th ed. 2002).[2]

Nor do they claim a viable federal question was not raised and preserved in the state proceedings.

Rather, they argue that because the three Justices who voted in favor of affirmance *might* have affirmed on the basis of an *undisclosed* state ground, that means there is both an adequate and independent state ground to justify denial of the petition.

But this Court long ago foreclosed such argument.

---

2. *Conroy v. Aniskoff*, 507 U.S. 511 (1993), was relied upon in the Petition for the proposition that this Court can jurisdictionally review a state supreme court judgment by an equally-divided supreme court where that decision acts as an affirmance. Respondents rely on it for a different proposition, namely, that where a state court acknowledges it is divided on a federal question, that effectively terminates any search for an independent and adequate state ground. However, the latter point does not undercut the former.

See Michigan v. Long, 463 U.S. 1032 (1983). Although Respondents cite the case, they disregard its teaching that where a

> decision fairly appears to rest primarily on federal law, or to be *interwoven* with the federal law, and when the adequacy and independence of any possible state law ground is *not clear from the face of the opinion*, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed federal law required it to do so.

Id. at 1040-41 (emphasis added).

In addition, it has long been the case that rank speculation as to a possible adequate and independent state ground is insufficient. As the Court has stated, the mere "possibility that the state court might have reached the same conclusion if it had decided the question purely as a matter of state law does not create an adequate and independent state ground that relieves this Court of the necessity of considering the federal question." *United Air Lines v. Mahin*, 410 U.S. 623, 630-31 (1973); *see Orr v. Orr*, 440 U.S. 268, 276-77 (1979); *cf. Frisby v. Schultz*, 487 U.S. 474 (1988) (Court did not speculate concerning other state grounds, but granted certiorari of an en banc decision without opinion by an equally divided court of appeals where a narrowing construction of a statute on state grounds could have precluded a possible First Amendment challenge).

In short, because the judgment below "*might* have rested on a nonfederal ground", *Sternbridge v. Georgia*, 343 U.S.

541, 543 (1952) (emphasis in original), is not sufficient to warrant denial.[3]

Finally, Respondents distort the proceedings below where Petitioners argued that, because there was no field preemption under federal law, *only* the state version of the filed rate doctrine could *possibly* apply, which Petitioners argued, it did not, given prior Wisconsin case law. The chances of any Justice both adopting Petitioners' argument below and affirming at the same time on some other ground not presented are both miniscule and totally speculative.

II.

RESPONDENTS HAVE NOT EXPLAINED AWAY THE WISCONSIN DECISION'S USE OF CLASSIC FIELD PREEMPTION LANGUAGE

Respondents do not try to justify the Wisconsin Decision by arguing that the AAA and its FMMOs preempt the field of milk marketing. Respondents also do not deny that the Wisconsin Decision uses classic field preemption language when it justifies its holding on the ground that "to calculate

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3. Respondents also ignore the fact that the reasoning and analysis of opinions affirmed by equally-divided courts are, in Wisconsin and in this Court, treated as persuasive authority. *See Kywanda v. Kywanda*, 200 Wis. 2d 26, 34, 546 N.W.2d 440, 444 (1996); *State v. Clansen*, 105 Wis. 2d 231, 239, 313 N.W.2d 819, 823 (1982). For example, this Court analyzed in some depth the district court opinion in *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 381-83, 391-98 (1982), without hand-wringing or speculation concerning the *en banc* affirmance without opinion by the equally divided court of appeals. Indeed, this Court treated the district court's reasoning as the reasoning of the court of appeals and reversed the court of appeals based on this Court's analysis of the district court's reasoning. *See id.* at 403.

the damages Servais claims . . . would undermine a congressional scheme of uniform rate regulation." App. at 12a; Op. Br. at 6. Instead, Respondents attempt to insert new language into the Wisconsin Decision, claiming that it

> did not in any way suggest that the federal milk marketing orders in question set uniform rates *for the entire country*; instead, it implied only that the federal milk marketing orders set uniform rates *for the regions covered by the orders.*

Op. Br. at 6 (emphasis in Opposition Brief). Respondents do not cite to any such qualifying statement in the Wisconsin Decision — because there is none.

Even if the Wisconsin Decision were so limited, given that Wisconsin is completely covered geographically by four separate FMMOs, each covering a different part of the state, the distinction is irrelevant. *See* Wis. S. Ct. Resp. App. at 16. The Wisconsin Decision held that, at the very least, where FMMOs are in place, as in all of Wisconsin, the AAA is field preemptive and the federal filed rate doctrine bars state antitrust causes of action.[4]

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4. Respondents rely on the Wisconsin Decision's statement in a footnote that "the federal government has not preempted the field for establishing milk orders." Op. Br. at 5 (quoting App. at 8a n.3). This statement contradicts both the text and holding of the Wisconsin Decision, and should not be allowed to be "a mere device to prevent a review of the decision upon the federal question." *Enterprise Irrigation District v. Canal Co.*, 243 U.S. 157, 164 (1917).

III.

RESPONDENTS HAVE NOT RECONCILED THE WISCONSIN DECISION WITH THE AUTHORITIES REQUIRING PREEMPTION AS A PREREQUISITE FOR APPLICATION OF THE FEDERAL FILED RATE DOCTRINE

Respondents argue that field preemption is not a prerequisite for application of the federal filed rate doctrine, because, according to Respondents, the federal filed rate doctrine does not prevent state regulation, so long as the state regulation does not "challenge[ ] the reasonableness of federally established rates." Op. Br. at 6. Respondents are essentially arguing that *conflict* preemption involving federally set rates is the *only* basis for application of the federal filed rate doctrine, and that conflict preemption is present here.

There are two fatal flaws in Respondents' argument.

First, Respondents have not found a single case — other than the Wisconsin Decision — that has ever applied the federal filed rate doctrine to bar relief under a state cause of action in the absence of field preemption.[5]

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5. Respondents attempt to support their argument with a citation to *Montana-Dakota Utils. Co. v. Northwestern Public Serv. Co.*, 341 U.S. 246 (1951), *see* Op. Br. at 6, but *Montana-Dakota* barred relief under the Federal Power Act, and not under any state cause of action, *see id.* at 248. Respondents also argue that the field preemption cases cited in the Petition do not use the term "field preemption," but that is certainly the kind of preemption found by those cases. *See* Pet. at 20-25. Respondents also argue baselessly that preemption

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Second, under Respondents' logic, there could be no holding of conflict preemption here because they implicitly acknowledge there could be no conflict between the AAA, the FMMOs and the Wisconsin antitrust laws because nothing more than *minimum* prices are set by the AAA and the FMMOs, and any damages award would be, in fact, permissibly *higher* — not lower — than the set minimum, to compensate for the downward manipulation of the price of bulk cheese.

IV.

RESPONDENTS DO NOT DENY THE CONFLICT BETWEEN THE WISCONSIN DECISION AND THE LONG-ESTABLISHED POLICY OF THE USDA

Respondents make no attempt to deny the conflict between the United States Department of Agriculture's long-standing policy and the Wisconsin Decision based on the fact that, under USDA policy, the FMMO minimum price does not involve any regulatory discretion or subjective judgments of reasonableness, but rather, is "arrived at in the market-place rather than by the Government." Pet. at 26. This goes to the core of any filed rate case: Is the "rate" set by an administrative agency or by the market? Here, the

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"could not have occurred" in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986), and *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922), *see* Op. Br. at 7, although the Interstate Commerce Act, "is among the most pervasive and comprehensive of federal regulatory schemes and has consequently presented recurring pre-emption questions from the time of its enactment." *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318-19, 331-32 (1981).

administrative agency *itself* says that the prices sought to be used by Petitioners in damages calculations are market prices.

Instead of responding to this, Respondents merely try to change the subject to the irrelevant point that other cases have not addressed the exact same formulation of the issues as is presented in this case. *See* Op. Br. at 8 ("petitioners allege no split of authority").[6]

CONCLUSION

For the foregoing reasons and for the reasons stated in the Petition, this Court should grant a writ of certiorari to the Wisconsin Supreme Court to summarily reverse the decision, or, alternatively, to grant plenary review of the questions presented in the Petition.

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6. If the USDA has not previously expressed its opinion on the precise question of whether the federal filed rate doctrine can bar state claims involving FMMOs, that, no doubt, is because no one ever previously tried to apply the federal filed rate doctrine to FMMOs. Of course, as noted previously, the Court can simply ask the USDA, through the Solicitor General, for its views.

Respondents' final argument, that the Federal Trade Commission and Commodity Futures Trading Commission "have already investigated petitioners' claims and determined that there is no basis for further inquiry," *see* Op. Br. at 8, is misleading and irrelevant. Neither of these agencies is charged with enforcing either FMMOs or Wisconsin's antitrust laws and neither based its decision on the filed rate doctrine or whether FMMOs involve regulatory discretion or subjective judgments of reasonableness. *See* Wis. S. Ct. Resp. App. 154-56, 191-92.

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